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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; MICHAEL RIVERA; DONALD E. VOLCK,
Petitioners,

v.

RAYMOND J. DONOVAN, Secretary of the United States Department of Labor;
KAYE R. KIDDOO, Director of the California Department of Employment Development,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. When Congress added subsection (A)(i) to its federal pension offset law in 1980 in response to criticism that its earlier, "total offset" law had treated social security recipients too harshly, did Congress intend to exempt from mandatory social security offset only that small percentage of unemployed workers whose base period employers were government agencies or certain non-profit organizations, or, as numerous statements and explanations in the legislative history reveal, did Congress intend to exempt from mandatory offset all unemployed workers whose social security benefits had vested before they began working for their base period employer?

2. When Congress added subsection (A)(ii) to its federal pension offset law in 1980 to ensure that a worker's private pension benefits would be offset only if that pension increased in value during the base period, did Congress intend to require offset of the *entire* amount of the worker's private pension, or consistent with the legislative purpose, did Congress intend to require offset of only the amount of the base period *increase*?

3. Does the construction of subsection (A)(ii) adopted by the Ninth Circuit violate the Equal Protection Clause in that there is no rational basis for requiring offset of the total amount of a worker's private pension benefits if his pension increased during his base period of employment, while requiring no offset at all if the worker's pension did not increase during such base period?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter "UAW"), Michael Rivera and Donald Volck respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on August 29, 1983, affirming in part and reversing in part a judgment of the United States District Court for the Northern District of California, entered on October 7, 1982.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 714 F.2d 887 and is set forth in Appendix A. The opinions of the District Court are reported at 543 F.Supp. 160 and 524 F.Supp. 136 and are set forth in Appendices B and C.

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 3304(a)(15)(A)(i) and (ii); California Unemployment Insurance Code § 1255.3 (these statutes are reprinted in Appendix K); U.S. Constitution, Amendments V and XIV.

STATEMENT OF THE CASE

This case raises an important issue of statutory construction that affects the pension and unemployment compensation rights of millions of elderly, unemployed workers throughout the country. The statute at issue, 26 U.S.C. § 3304(a)(15)(A), as amended in 1980, is the federal pension offset law. It establishes the conditions under which states are required to reduce, or "offset," the weekly unem-

ployment compensation payments received by their unemployed workers by the amount of public or private pension income (*i.e.*, social security or private pension benefits) that such workers are eligible to receive.[1]

The decision of the Ninth Circuit below attempts to construe the 1980 pension offset amendments without once discussing their extensive legislative history or the congressional policies that prompted their enactment. This was an error of considerable magnitude, as it enabled the Ninth Circuit to adopt a construction of the 1980 amendments that directly conflicts with the congressional intent. By disregarding all available evidence of legislative purpose, the Ninth Circuit has inexplicably required the states to offset the social security and private pension benefits of millions of elderly, unemployed workers under circumstances in which Congress has expressly stated that mandatory federal offset is not required. The Ninth Circuit's decision calls for prompt certiorari review.

For purposes of this case, the history of pension offset begins in 1976. In that year, Congress enacted a pension offset provision that required the states to offset *all* pension benefits received by *all* workers, regardless of the circumstances under which those pension benefits were earned. Elderly unemployed workers complained that this total offset law was unfair, because it unjustly penalized millions of workers who were involuntarily unemployed and who had worked hard throughout their lives to become eligible for a pension upon reaching a certain age. See *infra*, at 7, n.7. State employment officials complained that the total offset law was too broad, because it deprived them of their traditional authority to formulate unemployment compensation eligibility criteria in light of their state's own particular policies and circumstances. See *infra*, at 7-8, n.8.

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[1]For example, if an unemployed worker would normally be eligible for $100/week in unemployment compensation benefits and is also eligible for a $95/week pension, the state would be required to reduce his unemployment compensation benefits to $5/week if that pension is subject to total offset under the Act.

Congress responded to this widespread concern by postponing the effective date of the 1976 total offset law for four years to permit itself time to refer the pension offset issue to a National Commission and to conduct extensive hearings on the appropriate scope of the federal offset law. See *infra*, at 12. Then, in 1980, Congress amended the pension offset law. It did so for the express purpose of limiting the circumstances under which offset would be federally required, and thus to "allow . . . most benefits to be paid without offset." Cong. Rec. H9179, September 19, 1980 (remarks of Cong. Frenzel). The Ninth Circuit's construction of the 1980 amendments flatly defeats this goal, for it requires the states to offset virtually *all* of the social security benefits and *most* of the private pension benefits earned by newly-unemployed workers, leaving the vast majority of those workers in the same position they would have been in under the 1976 total offset law.

Two provisions of the 1980 pension offset amendments are at issue in this case: 26 U.S.C. § 3304(a)(15)(A)(i), which principally governs offset of social security benefits, and 26 U.S.C. § 3304(a)(15)(A)(ii), which applies only to offset of private pensions. See App. K. With respect to subsection (A)(i), the issue in this case is *under what conditions* the states are required to offset a worker's social security benefits. See *infra*, at 13-21. With respect to subsection (A)(ii), the issue in this case is *which* private private pension benefits should be offset. See *infra* at 21-28.

At first glance, the issues in this case may seem technical or complicated. In fact, they are quite easily resolved by reference to the extensive legislative history. Congress spent four years wrestling with the pension offset problem. However, once the sponsors of the 1980 amendments made the policy decisions required to resolve that problem, they made an extraordinary effort to explain, through discussion and example, precisely what they had done and why they had done it. The legislative history of the 1980 amendments is therefore replete with hypothetical situations and intended solutions, statements of policy and explanations

of intent, all of which show that the Ninth Circuit's construction of (A)(i) and (A)(ii) is inconsistent with Congressional intent.

This case was filed in August 1980 as a class action by Michael Rivera,[2] an unemployed, 72-year-old mechanic who had applied to his state employment agency for unemployment compensation benefits and was told that the 1980 pension offset amendments required the State to reduce his unemployment compensation checks each week by the amount of social security and private pension benefits that he was eligible to receive.[3] Petitioner challenged the federal construction of the 1980 amendments on numerous statutory and constitutional grounds, raising the issues presented in this Petition as well as several other issues that petitioners do not now pursue. See App., at 4-8, 19, 64-74.

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[2]Petitioner sued on behalf of a class certified as consisting "of all California residents whose unemployment benefits have been reduced or eliminated because of 26 U.S.C. § 3304(a)(15), as amended, California Unemployment Insurance Code § 1255.3, as amended, or U.S. Department of Labor or California Employment Development Department directives, rules, or policies implementing the aforesaid provisions." App., at 89. The California statute, Cal. Unemp. Ins. Code § 1255.3, provides that pension benefits are to be offset against a worker's unemployment compensation benefits in California only to the extent such offset is required by federal law. Accordingly, the District Court and the Court of Appeals properly concluded that this case presented a federal question, and that the District Court had jurisdiction under 28 U.S.C. § 1331. App., at 8 & n.2. Of course, because a federal statute is at issue, and because that statute is national in scope, the decision reached in this case will necessarily affect the pension and unemployment compensation rights of workers throughout the country, not just in California.

[3]Because petitioner Rivera's pension benefits were greater in amount than the unemployment compensation to which he would have been entitled, his unemployment benefits were reduced to zero. App., at 57-58.

On appeal, because a question had been raised as to petitioner Rivera's standing to raise the private pension claim under subsection (A)(ii), petitioners Volck and UAW (on behalf of its members) intervened as of right, eliminating any possible jurisdictional challenge. App., at 4, 94-97.

The United States District Court for the Northern District of California (Peckham, C.J.) ruled in favor of petitioners on the social security offset issue (subsection (A)(i)), and against petitioners on the private pension offset issue (subsection (A)(ii)). With respect to subsection (A)(i), the District Court relied upon the examples and explanations given by Senators Bradley and Boren, the principal architects of the 1980 pension offset amendments, and concluded that a worker's social security benefits were intended to be subject to mandatory federal offset only if that worker became eligible for his social security benefits as a result of his work for his "base period" employer.[4] If the worker became eligible for social security benefits *before* he began work for his base period employer, the District Court agreed with petitioners that the worker would not be subject to mandatory federal offset. App., at 45-51.[5] With respect to subsection (A)(ii), the District Court again looked to the legislative history, and concluded, this time contrary to petitioners' construction, that if a worker's private pension benefits increased during his base period of employment, the worker's *entire* private

[4]A worker's "base period" generally consists of four of the five quarters of the calendar year preceding the worker's application for unemployment compensation benefits. Thus,

> [i]n 37 states [including California], the 'base period' is the first 4 of the last 5 completed calendar quarters prior to the filing of a U.I. [unemployment insurance] claim. In 4 states, it is the most recent 4 quarters, and, in most other states, the 'base period' is the 52 weeks preceding filing.

H.R. Rep. 96-538, 96th Cong., 1st Sess., at 5 (1979). The base period is the period upon which a worker's unemployment compensation benefits is based. The "base period employer" is any employer for whom the worker was employed during his base period, *i.e.*, during the period in which he became eligible for unemployment compensation benefits. *See* App., at 9 n.3.

[5]Accordingly, the District Court issued an injunction, which the Ninth Circuit has kept in effect pending resolution of this Petition, enjoining respondents from offsetting the social security benefits of any worker who became eligible for those benefits prior to beginning work for his or her base period employer. App., at 55, 91-92, 99-100, 101-02.

pension must be offset, not just his base period *increase* (which is what petitioners urged). App., at 32-45. The District Court also rejected petitioners' Equal Protection challenge, concluding that the construction of subsection (A)(ii) that it had adopted was justified by considerations of "administrative convenience." App., at 68-74.

The social security offset issue was appealed by the federal (but not the state) respondents, and the private pension offset issue was cross-appealed by petitioners. After considering the arguments of the parties, and briefly remanding the case to resolve any jurisdictional defects, see *supra*, n.3, the United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. Disregarding the legislative history, and relying exclusively upon the statutory language, the Ninth Circuit rejected all of petitioners' arguments, in most cases without even discussing them.[6]

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[6]Thus, with respect to subsection (A)(i), the Ninth Circuit concluded that offset of social security benefits is required whenever the worker's base period employer pays into the social security system—*i.e.*, in every case in which the worker was laid off by an employer other than a government agency. App., at 8-14. With respect to (A)(ii) (which requires offset only where the pension has *increased* during the base period), the Ninth Circuit looked to the statutory language of the original *1976* Act and concluded that if a worker's private pension benefits increased during his base period, by even one dollar, that worker's entire pension must be offset, even that portion which vested many years before the start of the base period. App., at 14-17. The Ninth Circuit also adopted the District Court's Equal Protection analysis without additional comment. App., at 17-19.

The Ninth Circuit's construction of subsections (A)(i) and (A)(ii) is essentially the same as that adopted by respondent Secretary of Labor in Directive UIPL No. 7-81, which provides in part:

> A Social Security pension must be offset in its entirety if the base period employer paid Social Security taxes, even if the base period employer did not employ the individual during any period affecting his eligibility for or the amount of his Social Security pension. . . .
>
> A private pension that increases because of work during the base period must be offset *in its entirety*, not just in the amount of the increase.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

The 1980 amendments to the pension offset law were the product of many years of hearings, study and debate. There had been widespread dissatisfaction with the 1976 total offset rule, both within Congress and without, and Congress recognized that it must analyze the pension offset issue with particular care insofar as the financial security of millions of elderly and unemployed Americans was at stake.[7] Accordingly, when Congress sat down to revise its hastily-drafted 1976 law, it devoted a tremendous amount of energy and attention to the task of redrafting that law in such a way that would serve the purposes of the original Act, but which would also cause far less hardship to the nation's elderly and would permit the states far greater flexibility to devise their own solutions to the difficult policy issues surrounding pension offset.[8]

C.R. 30, Ex. B. The Ninth Circuit's statutory construction was not based upon principles of administrative deference, however. The court never suggested that it was deferring to the Secretary, it characterized the Secretary's Directive as interpretive rather than legislative, and it stated on numerous occasions that its construction was the only one permitted by the statutory language. App., at 4-7, 11, 13-17.

[7]Numerous Congressmen indicated that they had received more mail on the subject of the harshness and inequity of the 1976 pension offset law—particularly with respect to social security offset—than on any other pending legislation. *See, e.g.*, Cong. Rec. S10160, July 29, 1980 (remarks of Sen. Bradley) ("As one Senator, I have received as much mail on this issue as I have on practically any other issue before the Congress today"); Cong. Rec. H7908, August 26, 1980 (remarks of Cong. Biaggi) ("Since this onerous law went into effect . . . I have been deluged with mail from irate citizens who believe that they are being unjustly punished"); *ibid.* (remarks of Cong. St. Germain) ("I have been deluged with calls and letters from constituents [regarding this subject]").

[8]Representatives of the states were as upset with the 1976 total offset law as were representatives of the nation's elderly. Congressman Corman, who led the fight for the 1980 amendments in the House, noted that "State unemployment insurance administrators have worked very hard to get [the 1976 pension offset] provision

As a review of the statutory language will confirm, the 1980 pension offset amendments were not a model of legislative draftsmanship. These amendments were part of the lengthy Multiemployer Pension Plan Amendments Act of 1980, and as in so many other sections of that Act, Congress used imprecise and at times overly simplistic language to address difficult issues. But the Congressmen who sponsored the 1980 amendments were fully aware that they were legislating in a complicated area, and they were well aware that their amendments could be misunderstood unless their intentions were well-explained. Accordingly, spurred by the supreme national importance of enacting a fair and comprehensible pension offset law, the Congressional sponsors made a special effort to ensure that their colleagues, and perhaps at some later date the courts, would have all the information necessary to obtain a precise understanding of the legislative intent.

Because of the importance of this case—to the elderly and unemployed, to the states and to Congress—and because the legislative debates are so remarkably clear and complete, the Ninth Circuit had a special duty to construe the 1980 amendments accurately and on the basis of a complete record. The court should have pored over the legislative history, considering the numerous examples presented by the sponsors and reviewing the extensive debates for evidence of legislative intent. Instead, the court took

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repealed because they want to retain control of their State systems." Cong. Rec. H627, February 6, 1980 (remarks of Cong. Corman). *See also* S. Rep. No. 96-472, 96th Cong., 1st Sess., at 11. Similarly, the Chairman of the National Commission on Unemployment Compensation (which was the Commission to which Congress entrusted the task of reviewing the effects of the 1976 law), testified during hearings on the 1980 amendments that "[s]tate unemployment compensation administrators oppose a Federal standard that enters an area traditionally left to the States." Cong. Rec. S2100, March 4, 1980 (remarks of Sen. Javits). *See also* Serial 96-46, Hearing Before the Subcommittee on Public Assistance and Unemployment Compensation on H.R. 4464, 96th Cong., 1st Sess., at 5 (September 21, 1979) (remarks of S. Martin Taylor, Director of the Michigan Employment Security Commission, on behalf of the Interstate Conference of Employment Security Agencies).

a far more cavalier approach. Never once considering the legislative history underlying the 1980 amendments, and never even attempting to rebut petitioners' characterization of the legislative intent, the Ninth Circuit rested its entire statutory analysis on what it perceived to be the "plain meaning" of the statutory language. Even though the court expressly acknowledged that there was a "conflict" between the legislative history and the construction it adopted,[9] and even though the court was aware that the District Court had been compelled to seek guidance from the legislative history,[10] the Ninth Circuit inexplicably found the statutory meaning so strikingly apparent that it disregarded the legislative record entirely.

By ignoring the overwhelming evidence of congressional intent that was inconsistent with its own construction, the Court of Appeals for the Ninth Circuit violated long-established rules of statutory construction.[11] In the process, the court not only "decided a federal question in a way in con-

[9]App., at 11; *see also* App., at 16.

[10]*See* App., at 12, 15.

[11]When the legislative history of a statute provides persuasive evidence of congressional intent, "there certainly can be no 'rule of law' which forbids its use, however clear the words [of the statute] may appear on 'superficial examination.'" *Train v. Colorado PIRG*, 426 U.S. 1, 10 (1976) (citations omitted). A contrary rule would "make a fortress out of the dictionary . . . [and would ignore] that statutes always have some purpose or object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning." *Watt v. Alaska*, 451 U.S. 259, 266 n.9 (1981). Consideration of the objects and policy of a law is thus critical to an understanding of its intended scope. *See Bob Jones University v. United States*, U.S. , 103 S.Ct. 2017 (1983); *Rose v. Lundy*, 455 U.S. 509, 517 (1982); *Stafford v. Briggs*, 444 U.S. 527, 535 (1980); *Philbrook v. Glodgett*, 421 U.S. 707, 713-14 (1975); *Kokoszkav v. Belford*, 417 U.S. 642, 650 (1974). Indeed, this Court has noted that resort to the legislative history to determine congressional intent is particularly appropriate where, as here, the case requires construction of a complex unemployment insurance statute, for in such cases, it is often extremely difficult to ascertain the congressional purposes from the statutory language alone. *Calif. Dept. of Human Resources Develop. v. Java*, 402 U.S. 121, 133 (1971).

flict with applicable decisions of this Court," Sup. Ct. Rule 17.1(c), but it also "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. Rule 17.1(a).

It is critically important that this Court grant plenary review in this matter. While *UAW v. Donovan* is the first challenge to the 1980 pension offset amendments to be decided by a United States Court of Appeals, the issues raised in this Petition are having immense national impact, and are presently being litigated in state and federal courts throughout the country. Thus, one district court, *Bowman v. Stumbo*, C.A. C82-0244-L(A)(W.D.Ky.), *app. pndg*, Nos. 82-5746, 83-5457 (6th Cir.), and two state appellate courts, *Cullen v. Roberts*, 461 N.Y.S.2d 592 (App. Div.1983), and *Claim of Peat*, 464 N.Y.S.2d 35 (App. Div.1983), have already adopted petitioners' construction of subsection (A)(i), and cases raising the (A)(i) and (A)(ii) issues are currently pending in at least four other federal district courts. *See Peare v. McFarland*, C.A. S83-0069 (N.D.Ind.)(filed February 14, 1983); *Bleau v. Hackett*, C.A. 83-0327P (D.R.I.)(filed May 31, 1983); *Duso v. Adams*, C.A. 83-221-D (D.N.H.)(filed April 27, 1983); *Walker v. Donovan*, C.A.No. 81-72192 (E.D.Mich.)(filed July 1981). A prompt ruling by this Court will therefore not only resolve "an important question of federal law which has not been, but should be, settled by this Court," Sup. Ct. Rule 17.1(c), but, if petitioners are correct, it will also protect millions of unemployed workers from the irreparable harm to which they are now being subjected.[12]

While it may sometimes seem prudent for this Court to adopt a passive role when an issue is being litigated in the lower courts, either to await a conflict or to ensure a more fully developed record, those considerations are not pres-

[12]Prompt review would also save the states considerable administrative expense, because it would avoid the need for subsequent retroactive benefit determinations if petitioners' construction is ultimately adopted by this Court.

ent here. The record in this case is complete, and the legislative history is plain. If *certiorari* is now denied, tens of thousands of workers will be denied their full measure of unemployment compensation benefits pending subsequent review despite Congress' expressly stated intent that they be free from mandatory offset. Once these workers' pension benefits are offset, their money is gone. Since they are the principal intended beneficiaries of the 1980 amendments, to delay consideration of this important issue pending development of a conflict in the circuits will serve no policy of prudence and will cause severe and unnecessary hardship in direct conflict with the congressional intent. Because the Ninth Circuit's construction so thoroughly undermines Congress' carefully planned strategy to minimize the hardship of its pension offset rules, petitioners respectfully request that this Petition For Certiorari be granted.

ARGUMENT

Congress' decision to enact its original pension offset law in 1976 was tied to its concern that many elderly workers, after being laid off from their jobs, were collecting pension benefits *and* unemployment benefits based upon the same period of work. Congress called this practice "double-dipping," and determined to eliminate it. Accordingly, Congress enacted its 1976 pension offset law, as a response to the double-dipping problem, to prevent recently-unemployed workers from obtaining two forms of post-employment income for work performed during a single period of employment.[13]

The 1976 pension offset law was a model of legislative simplicity. It provided, without exception, that the states were required to offset all retirement income earned by their unemployed workers against whatever unemployment compensation benefits those individuals would otherwise

[13] *See* App., at 37 (noting that respondents and petitioners agree that "Congress was concerned with preventing the payment of both pensions and unemployment insurance benefits attributable to the same period in which the worker performed services"); Cong. Rec. H624, February 6, 1980 (remarks of Cong. Frenzel).

receive. See 26 U.S.C. § 3304(a)(15)(1976). This legislation served the goal of eliminating double dipping, because it prevented anyone who was receiving a pension from also receiving a full unemployment compensation check. At the same time, however, the law was brutally harsh. As representatives of the states and the nation's elderly were quick to inform Congress, the 1976 total offset law went much further than necessary to address the double-dipping problem, and it unduly penalized millions of hardworking Americans, particularly those entitled to social security, who were drawing pensions for which they became eligible many years before the period of employment from which they could double dip (*i.e.*, the base period).

Responding to the public outcry, and to permit itself additional time to research and study the pension offset issue, Congress delayed the effective date of its new statute, first until 1979, 90 Stat. 2667, 2680 (1976), and then until April 1, 1980, 91 Stat. 39, 45 (1977).[14] During this time, Congress presented the issue to the National Commission on Unemployment Compensation (which recommended an outright repeal of the pension offset law)[15] and it conducted its own hearings.[16] Congress ultimately agreed that the 1976 law was overbroad, and that prevention of double dipping could be accomplished through a more precisely-drawn offset provision. Accordingly, in 1980 Congress enacted two amendments to the 1976 law, carefully formulating them to ensure that double dipping would still be prohibited, but that the pensions of millions of elderly, unemployed Americans who were ***not*** double dippers would

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[14]*See* S. Rep. No. 96-472, 96th Cong., 1st Sess., at 3 (December 10, 1979) ("Because of concern that the provision may have been too broadly drawn, the effective date [of the 1976 pension offset law] was set in the future to permit time for study, and that effective date was subsequently further extended to March 31, 1980"); *id.*, at 11; Cong. Rec. S2100, March 4, 1980 (remarks of Sen. Javits); Cong. Rec. S2095 March 4, 1980 (remarks of Sen. Boren).

[15]*See* Cong. Rec. S2099, March 4, 1980 (remarks of Sen. Javits).

[16]*See, e.g.*, House Hearings, 96th Cong., 1st Sess., Serial 96-46 (September 21, 1979).

not be subject to mandatory offset. As petitioners will show, the Ninth Circuit's construction of the 1980 amendments shatters this congressional scheme.

I

Under Subsection (A)(i) of the 1980 Amendments, Mandatory Offset of Unemployment Compensation Benefits Is Required Only if the Worker Becomes Eligible for a Pension and for Unemployment Compensation as a Result of His Work for a Single Employer

In its 1980 pension offset amendments, Congress refined its 1976 total offset rule by adding three new subsections.[17] The first of these, subsection (A)(i), provides:

> (A) the requirements of this paragraph [governing offset] shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if—
>
> (i) such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period employer or chargeable employer (as determined under applicable law). . . .

26 U.S.C. § 3304(a)(15)(A)(i). The issue with respect to subsection (A)(i), which is the issue on which the legislative history is the clearest and most explicit, concerns the effect of this provision on a worker who earned a social security pension by working for one or more employers prior to his base period, and who was working for a completely different employer when he was subsequently laid off.[18]

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[17] Only the first two of those subsections, (A)(i) and (A)(ii), are at issue in this case. The third subsection, subsection (B), governs the extent to which a worker's contribution to his own pension may affect the total amount of his pension offset. *See* 26 U.S.C. § 3304(a)(15)(B) (1980), App., at 104.

[18] For example, suppose a worker had accumulated the 40 quarters of covered employed required to qualify for social security while he was working for Company A. If the worker decided some years later to take a new job with Company B, and if he were

As petitioners and the District Court read (A)(i), and more importantly, as the senators and representatives responsible for its enactment read (A)(i), no offset of a worker's social security benefits is required if that worker's eligibility for social security became vested—or, in the words of the Social Security Act, 42 U.S.C. § 414(a), if the worker had achieved "fully insured" status—before he began working for his base period employer (which is the employer responsible for his unemployment compensation claim). Even if his base period employer—like *every* private employer (and also, since 1983, like every non-profit employer[19])—was required by statute to pay a *per capita* social security tax, unless that employer "contributed to" the social security system in a way that affected the worker's eligibility for a pension, Congress did not intend to require social security offset.

As the Ninth Circuit reads subsection (A)(i), the states would be required to offset the social security benefits of virtually every worker in the country. Construing the term "maintained (or contributed)" with absolute literalness and without any consideration of the legislative purpose, the Ninth Circuit would require offset even where the social security tax payments of the worker's base-period employer had no effect whatsoever on the worker's eligibility for social security. Since every private employer (and now, every nonprofit employer) is required to pay a *per capita* social security tax on behalf of its employees, the Ninth Circuit's construction thus assumes that (A)(i) was added to the 1976 total offset law solely to ease the burden on employees whose base-period employer happened to be a government agency. There is no support in the legisla-

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subsequently laid off by Company B, the issue under (A)(i) would be whether the worker's unemployment compensation benefits should be reduced each week by the amount of social security benefits he had become entitled to receive (as a result of his work many years earlier for Company A).

[19] *See* Pub. L. No. 98-21, §§ 101, 102 (1983).

tive history for such a peculiar goal, however, and such a limited construction was assuredly *not* what Congress had in mind.

Subsection (A)(i) was enacted by Congress on September 19, 1980 as part of H.R. 3904, the Multiemployer Pension Plan Amendments Act of 1980. The language of subsection (A)(i) was borrowed intact from two predecessor bills: H.R. 5507, which was the bill containing (A)(i) as it first passed the House, and H.R. 4612, which was the bill containing subsection (A)(i) as it first passed the Senate.[20] The legislative history of all three of these bills is replete with explanations of the statutory policies and precise examples of how Congress intended the statutory language to be applied. This legislative history shows that, under *Congress'* construction of subsection (A)(i), an employer does not "maintain (or contribute to)" a worker's social security pension plan unless that employer's social security payments actually affect the worker's eligibility for social security benefits.[21] The legislative history therefore confirms the correctness of petitioners' construction.

In the Senate, H.R. 3904 was co-sponsored by Senators Bradley and Chafee. After the bill had emerged from con-

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[20]H.R. 5507 passed the House by a vote of 306 to 97 on February 6, 1980. *See* Cong. Rec. H628. H.R. 4612 passed the Senate 89-3. *See* Cong. Rec. S10160, July 29, 1980. These bills never went to conference, however, and the bills died, only to be resurrected in H.R. 3904, which was the bill that was finally enacted into law. *See* Cong. Rec. S10160, July 29, 1980 (remarks of Sen. Chafee); Cong. Rec. S10163, July 29, 1980 (remarks of Sen. Boren).

[21]Subsection (A)(i), which requires offset when the worker becomes eligible for his pension because of work for his *base period employer*, stands in sharp contrast to subsection (A)(ii), which requires offset when the worker's pension is based, at least in part, on employment during his *base period*. The Ninth Circuit failed to grasp this distinction, viewing the provisions as co-extensive, and it therefore placed mistaken reliance upon the exclusion of social security pensions from the scope of (A)(ii). *See* App., at 12.

ference (with the language of subsection (A)(i) intact),[23] the task of explaining the bill fell to Senator Bradley. He gave various examples of "how the new law will work as of 1981," including the following example, presented in the final speech before the Senate vote, which seemed to anticipate the very question now at issue:

> [A]n individual at company A retires and begins to collect social security. For whatever reason, this person then goes to work for company B and, after 6 months there, is terminated. Assuming the individual is eligible for unemployment insurance because of the work done at company B, the level of unemployment insurance compensation will not be reduced at all. *This is because the base period employer is not the same as the social security employer.* The offset would apply, however, if the individual had returned to work for company A instead of working for company B. Under those circumstances, the base period employer and the social security employer would be the same.

Cong. Rec. S12901 (September 18, 1980) (remarks of Sen. Bradley) (emphasis added).

This example could not be more directly on point. It explains that offset is not required of the thousands of workers, like petitioner Rivera, who began to collect social security payments after working for Company A, subsequently took a new job with Company B (the base period employer), and were then laid off. "Because the base period employer is not the same as the social security employer" in these cases, no offset under subsection (A)(i) is required. Since the Ninth Circuit has held that offset of the worker's social security benefits in such circumstances

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[23] The two most significant differences between the House and Senate bills that went to Conference were that the House bill included an amendment, which the Conference rejected, to eliminate *all* mandatory social security offsets and that the House bill also included subsection (A)(ii), which will be discussed *infra*, at 21-28. *See* H.R. Conf. Rep. No. 96-1343, 96th Cong., 2d Sess., at 3 (September 18, 1980).

is mandatory, the Ninth Circuit's construction cannot possibly be correct.[23]

[23]The District Court agreed with petitioners that Senator Bradley's example directly controlled the (A)(i) issue, as his example demonstrated, consistent with all the other legislative history, that Congress did not intend to require offset of social security benefits if the worker qualified for such benefits while working for someone other than his base period employer.

In the Ninth Circuit, respondent attempted to respond to this example by contending, first, that Sen. Bradley's example should be ignored because Sen. Bradley, as a relatively junior member of the Finance Committee that reported H.R. 3904 to the Senate floor, was not a member of the Conference Committee on H.R. 3904. However, respondent cannot dispute that Sen. Bradley was one of two co-sponsors of the (A)(i) language in the Senate, for respondent's own Directive at issue in this case describes Sen. Bradley as "one of two co-sponsors of the [(A)(i)] amendment." C.R. 70, Ex. B. Moreover, Sen. Bradley's membership on the Conference Committee is irrelevant, because both Houses agreed on the language of (A)(i) before Conference, and (A)(i) emerged from Conference completely unchanged. What is important is that Sen. Bradley, who was the floor manager of the bill, gave his explanation of (A)(i) in the last speech before H.R. 3904 was finally passed by the Senate, and that Sen. Bradley's example is consistent with all the other legislative history.

Respondent also contended, albeit in a footnote to his Ninth Circuit brief, that Sen. Bradley may have intended company B, the base period employer in his example, to be exempt from having to pay social security taxes for its employees. *See* Sec. Ct. of App. Br., at 44n.61. If this were correct, Sen. Bradley's example would be irrelevant (but not inconsistent with petitioners' construction) because it would not address the issue over which the parties differ.

But respondent is not correct. Under the law as it stood in 1980, the only employers who did not pay social security taxes for their employees were certain government agencies and certain non-profit corporations. If Sen. Bradley had been referring to such an employer, he would not likely have called it a "company." Surely, if Sen. Bradley had intended his example to apply only to the extremely small category of employers who were exempt from social security, he would have said so.

Sen. Bradley's intent to refer to "company" in the usual sense of the word is also confirmed by the press release he issued immediately following the Senate vote on September 19, 1980. In this press release, Sen. Bradley explained:

While the District Court's construction of (A)(i) was principally based upon Sen. Bradley's example in the Senate, that court could just as easily have relied upon the statements made by Senator Bradley's co-sponsor, Senator Chafee, who explained to his Senate colleagues that subsection (A)(i) was intended to "modif[y] the existing law to require that the reduction of unemployment compensation benefits is only required *if the pension comes from* the last employer." Cong. Rec. S10160, July 29, 1980 (remarks of Sen. Chafee) (emphasis added). As Sen. Chafee recognized, if the worker's social security pension was earned *before* the worker began employment for his base period employer, no offset would be required under subsection (A)(i).

The Senate's understanding of subsection (A)(i) was shared by the House. For example, House Conference Committee member Cong. Frenzel noted just minutes before the final vote on (A)(i) that, in contrast to the 1976 law which required offset of all pensions, the language of (A)(i) "restricted the offsets and *allowed most benefits to be paid without offset.*" Cong. Rec. H9179 (September 19, 1980)

> Suppose an individual at Company A retires and begins to collect Social Security. . . . For whatever reason, this person then goes to work *for some other business, Company B*, and is terminated after six months there. Assuming the individual is eligible for unemployment insurance because of the work done at Company B, the level of unemployment insurance compensation will not be reduced at all. But if this individual had returned to work for Company A instead of taking a job at Company B and then lost the position at Company A, the offset requirement would apply because the same firm would be the source of both the Social Security and unemployment compensation.

C.R. 39, Ex. 1 (emphasis added). This example not only reaffirms petitioners' construction of the statutory language of (A)(i), but it also demonstrates that Sen. Bradley understood his Company B to be a "business," *i.e.*, a private employer which is required to pay social security taxes.

(remarks of Cong. Frenzel) (emphasis added).[24] Under the Ninth Circuit's construction of (A)(i), however, an unemployed worker would be exempt from offset only in the uncommon situation that his base period employer did not pay into the social security system at all. Cong. Frenzel could not have concluded that "most" benefits would be free from offset if, as the Ninth Circuit's construction requires, the 1980 exemption was intended to apply only to certain governmental and non-profit employees.

The Ninth Circuit refused to discuss the example given by Sen. Bradley or the statements of Sen. Chafee, Cong. Frenzel and others. Moreover, the court failed to acknowledge the great volume of additional legislative history, with respect to the earlier versions of the statutory language in the House and the Senate, that supports petitioners' construction of subsection (A)(i).

The language of (A)(i) was originally presented to the Senate as an amendment to H.R. 4612, and it contained the identical language that was ultimately enacted. See Cong. Rec. S2091, March 4, 1980. Senator Boren, who was the Chairman of the Subcommittee on Unemployment Compensation of the Senate Finance Committee which reported H.R. 4612, was the manager of this bill on the floor of the Senate. Echoing petitioners' construction of the language that was to become subsection (A)(i), Sen. Boren explained:

> [The Committee Bill] would take care of the situation [in] which a person might have earlier in life worked for a particular employer, let us say for 20 years. He starts to draw his pension, which is not enough to live on. He takes another job and works for the second employer for, let us say, 10 years and then, because of an economic downturn, he is thrown out of work. Well, clearly, in that situation, he should not be denied the right to receive unemployment compensation because he might be drawing a pension for work which he

[24] *See also* Cong. Rec. H9180, September 19, 1980 (remarks of Cong. Brodhead, delivering a statement of Cong. Corman).

> finished doing for another employer some 10 or 15 years before. So the bill corrects that provision of the current law.

Cong. Rec. S2095, March 4, 1980 (remarks of Sen Boren).[25] *Accord*, Cong. Rec. S2104, March 4, 1980 (remarks by Sen. Javits); Cong. Rec. S2096, March 4, 1980 (remarks by Sen. Dole); Cong. Rec. S2109, March 4, 1980 (remarks by Sen. Levin).[26]

The legislative history of the predecessor to subsection (A)(i) in the House, H.R. 5507, which also used the language of (A)(i), similarly confirms the correctness of petitioners' construction. *See, e.g.*, H. Rep. No. 96-538, 96th Cong., 1st Sess., at 5-6 (October 19, 1979) ("the committee

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[25]In the Ninth Circuit, respondent Secretary of Labor attempted to distinguish Sen. Boren's remarks—which the District Court also relied upon, App., at 46-47—by suggesting that Sen. Boren may have been referring to private pensions in his example and not to social security pensions. Sec. Ct. of App. Br., at 23. There is no evidence in the legislative history to support this suggestion, and respondent cannot deny that the statutory language that Sen. Boren was referring to made no such distinction. Moreover, unless the two "employers" in Sen. Boren's example were certain government agencies or non-profit organizations that had opted out of the social security system, those employers *must* have been paying social security taxes on behalf of their employees. Finally, while respondent also suggested in the Ninth Circuit that Sen. Boren may have been referring to subsection (A)(ii), rather than (A)(i) (because subsection (A)(ii) distinguishes between social security and private pensions), subsection (A)(ii) was not even added to the bill in the Senate until *after* the Conference Report, five months after Sen. Boren spoke.

[26]The Finance Committee Report accompanying H.R. 4612 also confirms the correctness of petitioners' construction, as it explains that under the (A)(i) language, no offset is required unless the unemployed worker actually "receives" his pension from his base period employer. *See* S. Rep. No. 96-472, 96th Cong., 1st Sess., at 11-12, 25 (December 10, 1979). If an individual has reached fully insured social security status prior to beginning work for his base period employer, that worker cannot be said to have "received" his social security pension from his base period employer.

believes that an individual receiving a pension from an employer for whom he worked prior to this base-period employment . . . should be entitled to full U.I. protection"); Cong. Rec. H622, February 6, 1980 (remarks of Cong. Corman) (under the language of (A)(i), "[t]he treatment of pensions or retirement benefits maintained or contributed to *by employers other than 'base period' employers* would be left to State law").

While it may be appropriate for a court to disregard a statute's legislative history when that history is ambiguous and the statutory language is clear, a court charged with construing a complex unemployment compensation statute which affects millions of workers throughout the country commits serious error when it refuses even to discuss the numerous unequivocal statements in the legislative history that flatly contradict the court's perception of the statutory meaning. That error is magnified many times if the statutory program was carefully crafted by Congress to respond to a situation that was uniformly criticized for its unfairness and inequity, and where the court's statutory construction imposes severe hardship upon the very class of individuals whom the legislation was expressly designed to protect.

As a result of the Ninth Circuit's ruling, every day that passes, thousands of additional dollars of social security benefits are being offset contrary to Congress' wishes. Because the Ninth Circuit made no attempt to properly ascertain those wishes, and because the Ninth Circuit's construction plainly defeats the congressional intent, its decision should be reviewed by this Court.

II

Under Subsection (A)(ii) of the 1980 Amendments, States Are Required to Offset a Worker's Private Pension Benefits Only In The Amount By Which Those Benefits Increased During the Worker's Base Period

The second statutory provision at issue in this case is subsection (A)(ii), 26 U.S.C. § 3304(a)(15)(A)(ii), which

was introduced by Cong. Corman as an amendment to H.R. 5507 on February 6, 1980. See Cong. Rec. H625-26, February 6, 1980. This provision, which applies only to *private* pensions, exempts from mandatory offset all private pensions *except* those that vested or increased in value during the worker's base period employment. See App., at 104. The issue with respect to this subsection, which arises only when such a base period increase has occurred, is *which* of the worker's private pension benefits are required to be offset. Petitioners contend that offset is required only of the amount of the base period increase. The Ninth Circuit held that offset is required of the worker's *entire* pension, including amounts that had vested prior to the start of the base period.

The Ninth Circuit's construction was again based solely upon the statutory language. Without discussing the underlying congressional policies or petitioners' legislative analysis, the Ninth Circuit concluded that "[t]he wording of the statute . . . permits [only one] construction." App., at 16. But as even the District Court recognized, the words of subsection (A)(ii) are silent as to the issue of amount. They describe *when* pension benefits must be offset, but not *which* pension benefits must be offset.[27]

When measured against the congressional policies that prompted the enactment of subsection (A)(ii), the Ninth Circuit's construction makes no sense. As the District Court recognized, and as respondent concedes, the practice that Congress intended to eliminate when it enacted its pension offset law in 1976 was "double dipping," the practice of

[27]While the Ninth Circuit based its construction of subsection (A)(ii) on the statutory language, the language it relied upon was *not* that of subsection (A)(ii), but was rather the language of section 3304(a)(15), which subsections (A)(i) and (A)(ii) were enacted to amend. Section 3304(a)(15), in context, is not nearly as clear as the Ninth Circuit indicated. It provides:

> The amount of [unemployment] compensation payable to an individual for any week . . . which begins in a period with respect to which such individual is receiving a [pension] shall be reduced (but not below zero) by an amount equal to the

workers seeking two forms of post-employment compensation (unemployment benefits plus pension benefits) based upon work performed during one period of employment. The 1976 pension offset law eliminated the double dipping problem (by offsetting all pension benefits against unemployment compensation), but in the process, it also eliminated millions of dollars in benefits that were not earned during the base period and that therefore could not have been the source of double dipping.

The 1980 amendments in general, and subsection (A)(ii) in particular, were designed by Congress to provide a more tailored, and more equitable, solution to the double-dipping problem. Since a worker's eligibility for unemployment compensation benefits only accrues during his base period of employment,[25] and since a worker's pre-base period employment can therefore have no effect on his entitlement to unemployment compensation, Congress provided in subsection (A)(ii) that offset would be required *only of the pension benefits that were attributable to his base period employment*—the period upon which his unemployment compensation benefits were also based. This approach achieved Congress' goal of easing the harsh burdens imposed by its 1976 total offset law, while ensuring the continued offset of those pension benefits that could be a source of double dipping. It guaranteed that no worker would be able to draw two forms of overlapping compensation for work performed during the same period, *and* that no worker would be penalized because he had earned some of his pension benefits *before* the start of his base period.

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amount of such pension . . . which is reasonably attributable to such week.

26 U.S.C. § 3304(a)(15) (1976). While this language, in the abstract, may require offset of all private pension benefits, once subsection (A)(ii) comes into play, its impact is fundamentally changed. It requires offset only of the pension benefits unprotected by (A)(ii), which are the benefits attributable to the base period only. Any other construction would defeat the legislative policy of limiting offset to pension benefits that could be a source of double dipping.

[25] *See, e.g.*, Cal. Unemp.Ins.Code § 1275.

The Senate believed it had achieved this goal through its enactment of subsection (A)(i). Indeed, Sen. Boren explained to his colleagues in the Senate that under his construction of (A)(i), the only pension benefits subject to mandatory offset would be those that were actually earned during the worker's base period employment:

> In other words, that part of the employment . . . that is a base for drawing the unemployment benefits . . . would be offset; but the remainder would not be offset. I think that is fully reasonable.

Cong. Rec. S2104, March 4, 1980 (remarks of Sen. Boren).

Despite Sen. Boren's statement, members of the House were not persuaded that (A)(i) sufficiently solved the problem. The House therefore added subsection (A)(ii) "to clarify the Senate-passed amendment [to] accomplish the intended goal of this legislation," Cong. Rec. H7905, August 26, 1980 (remarks of Cong. Weiss), and "to restore unemployment compensation benefits to [those] individuals who have been the victims of earlier imprecise legislation." Cong. Rec. H7908, August 26, 1980 (remarks of Cong. St. Germaine). Viewed as an attempt to limit the pension offset provision to its underlying purpose—prevention of double dipping—and as a reaction by the House of Representatives to the Senate's failure to sufficiently accomplish that goal through subsection (A)(i), subsection (A)(ii) must be read as requiring the offset only of the pension amounts attributable to the worker's base period employment, the only period into which the worker could double dip.

The Ninth Circuit did not analyze the legislative policies underlying subsection (A)(ii).[29] Moreover, it ascribed to Congress an intent to amend the pension offset provision

[29]By contrast, the District Court looked to the legislative history of subsection (A)(ii) because various "passages within the legislative history . . . suggest that the plain meaning of (A)(ii) is at variance with the policy behind the enactment." App., at 36. Despite the persuasiveness of these policies, however, the District

in a manner that lacks any discernible purpose. No rational legislative interest is served by requiring the *entire* offset of one worker's pension and *no* offset of another worker's pension, simply because the first worker's pension increased slightly in value during his base period of employment.[30]

Court ruled against petitioners on the strength of a second example presented by Senator Bradley just before the final Senate vote. That example provides:

> A worker at company A retires at age 65 after 35 years of service there and begins collecting a pension of $600 per month. He then unsuccessfully seeks new employment and files an unemployment insurance claim. The state computes this individual's unemployment benefit rate at $130 per week, or $520 per month, because of the past earnings reported to the state. This individual would not be eligible for unemployment insurance payments because the amount of the pension received from the base period employer exceeded the unemployment insurance payments that were to be paid.

Cong Rec. S12901, September 18, 1980 (remarks of Sen. Bradley). The District Court never had the benefit of petitioners' analysis of this example (which had not been raised by respondent), and the District Court failed to realize that, read properly, Senator Bradley's example was fully consistent with petitioners' construction.

Petitioners have never denied that total offset is required under the circumstances described by Senator Bradley. Subsection (A)(ii) plainly states that offset is required if the worker's benefit level increased, or if he became *eligible* for benefits during his base period of employment. If a worker becomes eligible for his pension during his base period, all of his benefits are attributable to his base period year, and, under (A)(ii), his pension should be offset in full. Since Senator Bradley's worker turned 65 during his base period employment, and since 65 is a common age for workers to become eligible to receive their pensions, it is quite likely that the example given by Senator Bradley involved eligibility rather than an increase in benefits. Viewed in this light, Sen. Bradley's example is in no way inconsistent with the policy of the Act or with petitioners' construction. It merely demonstrates how subsection (A)(ii) would affect a worker who first became "eligible" for a pension during his base period employment.

[30]The issue is best understood in the context of the following example. Imagine two workers, A and B, both of whom were laid off on the same day by the same employer. Assume that worker A had

The only significant policy justification the courts below could articulate for offsetting a worker's entire pension under subsection (A)(ii) was "administrative convenience." App., at 18. Presumably, the courts felt that it would be easier for a state employment agency to offset a worker's entire pension (in the event of a base period increase) than to offset just the amount of the increase. But not only is there no indication in the legislative history that Congress intended this issue to be resolved by considerations of administrative convenience, there is also no basis for such an indication, for it is *not* administratively more convenient to offset the entire amount of a worker's pension rather than just the amount of his base period increase. Under subsection (A)(ii), the states are *already* required to calculate a worker's base period increase in order to determine whether offset is appropriate. Once that individualized determination has been made, there is no reason why it would be more convenient to offset the total amount of a worker's pension than to offset merely the base period increase. *Cf. Orr v. Orr*, 440 U.S.

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accrued a pension prior to the start of his base period that was worth $100 per week (the maximum amount under his particular pension plan). Assume also that worker B started work shortly after worker A, and that at the start of worker B's base period, he had accrued a pension worth only $99, one dollar short of the maximum. Because worker A had already reached his maximum allowable pension before his base period began, the amount of his pension did not increase as a result of his work during the base period. However, because worker B had not yet reached the maximum allowable pension by the start of his base period, his pension increased by one dollar during his base period, thereby raising the total amount of his pension to the $100 maximum.

With respect to their pre-base period pensions, worker A and worker B are identically situated. They both earned pension benefits prior to the start of their base periods, and for reasons stated earlier, in neither case could those pre-base period pensions have been a potential source of double dipping. Nonetheless, under the Ninth Circuit's construction of subsection (A)(ii), worker A is told that he may keep the full $100 of his pre-base period benefits, while worker B is told that his $99 in pre-base period benefits will be fully offset.

268, 281 n.12 (1979) (a legislative classification may not be justified on the grounds of "administrative convenience" if individualized determinations would be required with or without the challenged classification).[31]

A second reason for rejecting the Ninth Circuit's "total offset" construction of subsection (A)(ii) is that such a construction would violate the Equal Protection Clause. While petitioners readily acknowledge that Congress is permitted great deference in areas of economic or social welfare legislation, and that Congress may draw legislative lines with less than "mathematical nicety," *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970), there is *no* rational basis to justify offsetting the pre-base period pensions of one worker, but not another, because of events that occurred during the base period. With respect to their pre-base period pensions and employment, those workers are identically situated.

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[31]Respondent Secretary of Labor has apparently conceded the inapplicability of the "administrative convenience" justification, as he made no attempt in the Ninth Circuit to dispute petitioners' showing that the legislative classification does not in any way serve that interest. *See* Sec. Ct. App. Brief, at 40-41. Respondent did suggest in the Ninth Circuit that the legislative classification could have been based on Congress' desire to "relieve [employers] of responsibility for payment of dual post-employment money benefits where both benefits are based in whole or in part, on the same recent period of employment." *Id.*, at 40. But the factual predicate for that statement is erroneous. For purposes of calculating unemployment compensation benefits, the worker's pre-base period employment is irrelevant. The only pension benefits that are "based . . . on the same recent period of employment" as unemployment compensation benefits are the benefits earned during the worker's base period. Thus, while petitioners freely concede that, under (A)(ii), pension benefits earned *during* the base period are subject to offset, a rule that requires offset of private pension benefits earned *prior* to the start of the base period does not relieve employers of the responsibility of paying such "dual post-employment money benefits" for work performed in "the same recent period of employment," any more than such a rule would prevent double-dipping.

This constitutional question need not be reached, however. The reason there is no rational basis to justify the Ninth Circuit's construction is that Congress did not *intend* such a construction. Rather, it intended to protect *both* workers' right to receive their pre-base period pensions free from offset.

CONCLUSION

For all the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Appendices follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Nos. 81-4473, 82-4394, 82-4417, 82-4585, 82-4607, 83-2006
D.C. No. CV 80-3469 RFP

Michael Rivera, on behalf of himself
and all others similarly situated,
Plaintiff-Cross-Appellant-Appellee,
and
International Union, United Automobile, Aerospace
and Agricultural Implement Workers of America
and Donald E. Volck,
Plaintiff-Intervenors-Cross-Appellants-Appellees,

v.

Gloria Becerra, Director of California Employment
Development Department,
Defendant-Appellee,
and
Raymond J. Donovan, Secretary of United States
Department of Labor,
Defendant-Appellant-Cross-Appellee.

[Filed Aug. 29, 1983]

OPINION

Appeal from the United States District Court
For the Northern District of California
The Honorable Robert F. Peckham, Presiding
Argued March 16, 1983; Submitted May 12, 1983

Before: Fairchild,* Hug, and Farris, Circuit Judges.

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*The Honorable Thomas E. Fairchild, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

Hug, Circuit Judge:

This is an action challenging, on constitutional, statutory, and procedural grounds, amendments to the Federal Unemployment Tax Act and their interpretation by the Secretary of Labor ("Secretary"). The law in issue concerns the manner in which unemployment benefits are offset by various pension benefits. The issues on appeal are (1) whether the Secretary should have complied with notice and comment procedures before issuing rules explaining how states are to apply the law, (2) under what circumstances social security benefits offset unemployment benefits, (3) to what extent private pension benefits offset unemployment benefits, (4) whether the private pension offset is unconstitutional, and (5) whether pensions which vest before the section's effective date should offset unemployment benefits. We rule for the Secretary on all five issues, reversing the district court on the first two issues, and affirming on the last three issues.

I

FACTS AND BACKGROUND

Michael Rivera is 72 years old and retired. After retiring on his social security pension and private pension, he took a part-time job, earning about $100 per week, to help meet his expenses. He was eventually laid off from this job and applied for unemployment insurance benefits. But for his pensions, he would have been entitled to $54 per week. Because of his pensions, however, he was ineligible for unemployment insurance benefits.

Rivera then brought this action against the Secretary of Labor and the Director of the California Employment Department on behalf of himself and all others similarly

situated. He challenged the amendments to the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311, under which his unemployment benefits were offset by his pension benefits. Specifically, he challenged the constitutionality of 26 U.S.C. § 3304(a)(15)(A), the Secretary's interpretation of that section, and the manner in which the Secretary promulgated his interpretation.

The district court certified a class of "all California residents whose unemployment benefits have been reduced or eliminated because of 26 U.S.C. § 3304(a)(15), as amended, California Unemployment Insurance Code § 1255.3, as amended, or United States Department of Labor or California Employment Development Department directives, rules, or policies implementing the aforesaid provisions."

The district court ruled on the substantive issues in two opinions on cross-motions for summary judgment. *Rivera v. Patino*, 524 F.Supp. 136 (N.D. Cal. 1981); *Rivera v. Patino*, 543 F.Supp. 1160 (N.D. Cal 1982). In the first opinion, the district court ruled that section 3304(a)(15) was constitutional, 524 F.Supp. at 147, but struck down the Secretary's directive interpreting section 3304(a)(15) for failure to comply with certain procedures set forth in the Administrative Procedure Act. *Id.* at 149. In the second opinion, the district court ruled that the Secretary had correctly interpreted section 3304(a)(15) as to the manner in which private pensions offset unemployment benefits, 543 F. Supp. at 1172, but that his interpretation as to the manner in which social security benefits offset unemployment was in error. *Id.* at 1174-75.

Both sides appealed.

After it was called to the attention of this court that Rivera might lack standing as to one or more of the issues raised, we remanded the case to the district court. On remand, the district court vacated its judgment, permitted Donald Volck and the United Auto Workers to intervene as parties plaintiff, and then reinstated its judgment. The addition of Volck and the Union as named plaintiffs cured the possible standing problem. The case is now back before this court.

II

NOTICE AND PUBLIC COMMENT REQUIREMENT

Unemployment Insurance Program Letter ("UIPL") Directive Number 7-81, issued by the Secretary, explains to the states how they are to apply the pension offset rules contained in 26 U.S.C. § 3304(a)(15). Rivera contended in the district court that the directive was invalid because the Secretary had failed to provide notice and an opportunity for public comment. The district court agreed, holding that, regardless of whether the Administrative Procedure Act ("APA") applied, notice and an opportunity for public comment were required because the directive had "a substantial impact upon the rights of private parties." 524 F.Supp at 148.

Rivera argues that the district court's analysis is correct. He apparently concedes that the APA does not require notice and an opportunity for public comment since the directive is an "interpretative rule," and therefore exempt from the APA's notice and comment requirements. 5 U.S.C.

§ 553(b)(A).[1] Nonetheless, Rivera argues that the district court correctly ruled, under the common law of administrative procedure, that notice and an opportunity for public comment were required because the directive had a substantial impact.

The district court's ruling was based on the holdings of several other courts that even interpretative rules must comply with the notice and comment procedure if they have a "substantial impact." *See, e.g., Pharmaceutical Manufacturers Ass'n v. Finch*, 307 F.Supp. 858, 863 (D. Del. 1970); 2 K. Davis *Administrative Law Treatise* § 7:17 (2d ed. 1979) [hereafter "Davis"]. The theory behind these cases is that, although section 553 does not require the notice and comment procedures for interpretative rules, it also does not prohibit it, and the APA was not intended to cut off the prior developing case law which required agencies to use fair procedure. Davis, § 7:18 at 89.

Other courts, however, have rejected the notion that agencies must comply with the notice and comment procedure for interpretative rules which have a substantial impact. *See, e.g., Energy Reserves Group, Inc. v. Dept. of Energy*, 589 F.2d 1082, 1094 (Temp. Emer. Ct. App. 1978). The argument against the substantial impact test is that Congress considered the matter and, in section 553, explicitly excepted "interpretative rules [and] general statements of policy" from the notice and comment procedure.

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[1]The District of Columbia Circuit has ruled that one portion of UIPL Directive No. 7-81 is legislative rather than interpretative, and therefore void until the notice and comment procedure is complied with. *Cabais v. Egger*, 690 F.2d 234, 238 (D.C. Cir. 1982). The Secretary has acquiesced in nonenforcement of this portion of the directive.

Davis, § 7:18 at 88. Furthermore, agencies now freely issue interpretative rules, and requiring agencies to use the notice and comment procedure would deter them from issuing such rules to the detriment of those who look to the agencies for guidance. *Id.*

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), the Supreme Court cast considerable doubt on the viability of those cases holding that the notice and comment procedure may be judicially required even where not required by the terms of the APA. *Vermont Yankee* concerned the application of section 553. Unlike this case, in *Vermont Yankee* the notice and comment procedure was required by the APA. The question was whether additional procedures could be judicially required. The Court held that additional procedures could not be required and stated:

> [Section 553 establishes] the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.

435 U.S. at 524 (footnote omitted).

There is a difference of opinion as to the proper interpretation of this language from *Vermont Yankee*. Professor Davis argues for interpreting it very narrowly. He says that this language "may be effective as a prohibition against adding cross-examination to § 553 procedure, and

as a prohibition against adding other requirements which the Supreme Court disapproves," Davis, § 7:19 at 94, but not as a prohibition against requiring "notice and comment procedure for issuing an interpretative rule having substantial impact." *Id.* at 91.

The District of Columbia Circuit disagrees with Professor Davis. In a case involving the same directive which is in issue here, *Cabais v. Egger*, 690 F.2d 234 (D.C. Cir. 1982), that court rejected the substantial impact test and held that the Secretary was not required to employ the notice and comment procedure before issuing UIPL Directive No. 7-81. *Id.* at 237-38. The court wrote that since *Vermont Yankee*, "it is clear that a court cannot engraft additional procedures on agency action beyond those contemplated by the APA (or another specific Act). Simply because agency action has substantial impact does not mean it is subject to notice and comment if it is otherwise expressly exempt under the APA. *Id.* at 237 (footnotes omitted).

This court has never ruled on the substantial impact test. It was raised in *Stoddard Lumber Co. v. Marshall*, 627 F.2d 984, 987-88 (9th Cir. 1980), and *Louisiana-Pacific Corp. v. Block*, 694 F.2d 1205, 1210 (9th Cir. 1982), but the court found it unnecessary to adopt or reject the test because there was no substantial impact in either case.

We agree with the District of Columbia Circuit that compliance with the notice and comment procedure was not required before the Secretary issued UIPL Directive No. 7-81. Even before *Vermont Yankee*, it was questionable whether the notice and comment procedure could be judicially required in the case of an interpretative rule, such as UIPL Directive No. 7-81, for which Congress had ex-

plicitly provided an exemption. *See* 5 U.S.C. § 553(b)(A). Although *Vermont Yankee* dealt with a somewhat different problem, the clear message of that case is that courts are not to engraft "their own notions of proper procedures upon agencies" beyond the requirements of section 553. 435 U.S. at 525. Thus, in view of the express exemption in section 553 and the admonition of *Vermont Yankee*, we reject the substantial impact test and reverse the district court on this issue.

III

SOCIAL SECURITY OFFSET

Although the district court invalidated UIPL Directive No. 7-81 for failure to comply with the notice and comment procedure, it later found it necessary to rule on the directive's interpretation of the substantive law in question, 26 U.S.C. § 3304(a)(15). 543 F.Supp. at 1163. It was necessary for the district court to interpret section 3304 (a)(15) because the Director of the California Employment Department ("Director") was continuing to interpret section 3304(a)(15) consistently with the invalidated directive and was administering California's unemployment insurance program accordingly.[3]

Section 3304(a)(15)(A)(i) specifies the conditions under which unemployment benefits are to be reduced by social

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[3]Technically, it was California Unemployment Insurance Code § 1255.3, the state statute implementing 26 U.S.C. § 3304(a)(15), which the Director was interpreting. There is no doubt, however, that the state statute was intended to be construed in the same manner as the federal statute. Indeed, the state law even contains a self-destruct provision, which automatically repeals any provision not required by the federal statute. Cal. Unemp. Ins. Code § 1255.3(b) (West Supp. 1982).

security and other pension benefits. This section requires the offset of benefits paid under a plan which the base period employer[3] "maintained (or contributed to) . . . ." 26 U.S.C. § 3304(a)(15)(A)(i). Section 3304(a)(15)(A) provides:

> § 3304. Approval of State Laws
>
> (a) Requirements—The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that—
>
> . . . .
>
> (15) the amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week except that —
>
> (A) the requirements of this paragraph shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if —

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[3]The "base period" is the period of employment during which eligibility for unemployment insurance benefits is accrued. Its length is four calendar quarters. A "base period employer" is an employer who paid wages on which the claimant's eligibility for unemployment benefits is based. H. R. 96-538, 96th Cong., 1st Sess. 5 (1979).

(i) such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period employer or chargeable employer (as determined under applicable law), and

(ii) in the case of such a payment not made under the Social Security Act or the Railroad Retirement Act of 1974 (or the corresponding provisions of prior law), services performed for such employer by the individual after the beginning of the base period (or remuneration for such services) affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar payment.

The situation giving rise to the dispute over the proper treatment of social security benefits arises when a worker who is receiving social security benefits as a result of his employment with one employer, reenters the work force and goes to work for a second employer who also contributes to social security, and then is laid off by the second employer and applies for unemployment insurance benefits on the basis of his employment with the second employer. Under the Secretary's interpretation, in this situation the unemployment benefits would be offset by the social security benefits.[4] Under the interpretation

[4]Section 3304(a)(15)(B), however, permits the states to reduce this offset by the amount of the social security benefits attributable to the worker's own contributions. Since one-half of the social security contributions are paid by the worker, states may choose to reduce this offset by at least one-half. Moreover, under the Secretary's most recent interpretation of section 3304(a)(15)(B), the states may choose not to offset unemployment benefits at all by social security benefits. UIPL 7-81, Change 2 (March 11, 1983).

urged by Rivera and adopted by the district court, the social security benefits would not offset the unemployment benefits at all because the worker qualified for the social security benefits while working for a different employer than his base period employer.

The purpose of the 1980 amendments, of which the section in issue was a part, was to ameliorate the effect of earlier amendments which required an offset for all pension and social security benefits. This goal was accomplished by providing that only pensions that the base period employer maintained or contributed to, and in the case of private pensions only those pension benefits which were increased or for which the worker became eligible during the base period, would offset unemployment benefits. 26 U.S.C. § 3304(a)(15)(A)(i) and (ii). The amendments also permit the states to reduce the offset by the amount of the pension benefit attributable to the worker's own contribution. *Id.* at § 3304(a)(15)(B). Rivera contends that Congress also sought to achieve its objective by exempting from the offset social security benefits for which the worker qualified while working for someone other than the base period employer.

The dispute over the proper interpretation of section 3304(a)(15)(A)(i) arises out of a conflict between a portion of the legislative history and the language of the statute.

Section 3304(a)(15)(A)(i) says that if a base period employer contributes to social security, then the unemployment benefits must be offset by the social security benefits. The statutory language does not permit another interpretation. The offset applies under section 3304(a)(15)(A)(i)

if the base period employer *"contributed"* to the "plan" from which the pension benefits are derived. Unlike section 3304(a)(15)(A)(ii), which does not apply to social security benefits, section 3304(a)(15)(A)(i) does not say the offset will not apply if the base period contributions did not affect eligibility for or the amount of the pension benefits.

The argument for not requiring an offset in these circumstances is based almost entirely on a statement by Senator Bradley. The language in section 3304(a)(15)(A)(i) was taken from an earlier bill and included as part of an amendment offered by Senator Bradley. The Senator offered several examples of how his amendment would work. The crucial example is as follows:

> [A]n individual at company A retires and begins to collect social security. For whatever reason, this person then goes to work for Company B and, after 6 months there, is terminated. Assuming the individual is eligible for unemployment insurance because of the work done at company B, the level of unemployment insurance compensation will not be reduced at all. This is because the base period employer is not the same as the social security employer. The offset would apply, however, if the individual had returned to work for company A instead of working for company B. Under those circumstances, the base period employer and the social security employer would be the same.

126 Cong. Rec. § 12901 (daily ed. September 18, 1980) (remarks of Senator Bradley). The district court found Senator Bradley's statement persuasive.

Rivera argues that Senator Bradley's statement is conclusive, even if contrary to the apparent meaning of the statute, because it is a clear statement of legislative intent

and such an interpretation would be reasonable and consistent with the policy of the legislation. *See Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 710 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). The Secretary argues that Senator Bradley was either mistaken or was referring to a case where the second employer did not contribute to social security. Regardless, the Secretary argues that a statement by one senator should not control over the clear meaning of the statute. *See Piper v. Chris-Craft Industries*, 430 U.S. 1, 26 (1977); *American Smelting and Refining Co. v. OSHRC*, 501 F.2d 504, 509 (8th Cir. 1974).

Each side cites to a number of other portions of the legislative history to support its interpretation. Each of these other citations, however, is ambiguous and can be explained away as either referring only to private pensions or as referring to a different section of the law.

"The best indicator of what statutory words mean is what they say." *Finnegan v. Matthews*, 641 F.2d 1340, 1344 (9th Cir. 1981). Determining the meaning of a statute from its legislative history is a "step to be taken cautiously," *Piper*, 430 U.S. at 26, particularly when the meaning appears clear on the face of the statute. *See Church of Scientology v. United States Dept. of Justice*, 612 F.2d 417, 422 (9th Cir. 1979). Where, as here, there is no ambiguity in the statutory language, resort to the legislative history is usually unnecessary. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978); *United States v. Rone*, 598 F.2d 564, 569 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). While the legislative history may be considered where the plain meaning of the statute "would

lead to an unreasonable result 'plainly at variance with the policy of the legislation as a whole,'" *Gila River*, 626 F.2d at 710, *quoting Ozawa v. United States*, 260 U.S. 178, 194 (1922), such is not the case here. The statutory language in question was a part of an attempt by Congress to ameliorate the harsh effects of earlier legislation, and the line drawn by the statute is neither so unreasonable nor so at variance with the policy of the legislation as to justify disregarding the clear meaning of the statute's words.

We reverse the district court on this issue. Senator Bradley's statements cannot replace the interpretation compelled by the statutory language. *See SEC v. Mount Vernon Memorial Park*, 664 F.2d 1358, 1364 (9th Cir.), *cert. denied*, 456 U.S. 961 (1982). Section 3304(a)(15)(A)(i) says and means that social security benefits offset unemployment benefits if the base period employer makes social security contributions.

IV

PRIVATE PENSION OFFSET

Section 3304(a)(15)(A)(i) provides that pension benefits will offset unemployment benefits only if the base period employer maintained or contributed to the pension plan. In the case of private pensions, section 3304(a)(15)(A)(ii) further limits the cases in which there will be an offset by providing that a private pension will not offset unemployment benefits if the worker's base period employment did not "affect eligibility for, or increase the amount of, such pension . . . ."

Rivera contends that under section 3304(a)(15)(A)(ii), a private pension which increases during the base period

employment should only offset unemployment benefits by the amount of that increase. Under the Secretary's interpretation, the entire amount of the pension would offset the unemployment benefits. The district court found the Secretary's interpretation to be correct. 543 F.Supp. at 1172.

The district court's ruling that the full amount of a pension should be offset where section 3304(a)(15)(A)(ii) applies is based on the wording of that section. The district court interpreted section 3304(a)(15)(A)(ii) as specifying which pensions will offset unemployment benefits, *i.e.* those pensions for which the claimant's base period employment affected his eligibility or increased his benefits, but not as determining the amount of the offset. The amount of the offset is contained in the paragraph which section 3304(a)(15)(A)(ii) modifies, section 3304(a)(15). That paragraph calls for an offset of the full amount of the pension. (This is modified, however, by section 3304(a)(15)(B), which permits the states to reduce the offset by the amount of the pension benefits attributable to the claimant's own contributions.)

Rivera's argument, that under section 3304(a)(15)(A)(ii) only the amount by which the pension increased during the base period is offset, is based almost entirely on Rivera's characterization of the legislative intent. As the district court noted, however, to the extent that the legislative history touches on this problem, it supports the Secretary's interpretation.

The one portion of the legislative history which is closest to being on point is another of Senator Bradley's examples:

> A worker at company A retires at age 65 after 35 years of service there and begins collecting a pension of $600 per month. He then unsuccessfully seeks new employment and files an unemployment insurance claim. The State computes this individual's unemployment benefit rate at $130 per week, or $520 per month, because of the past earnings reported to the State. This individual would not be eligible for unemployment insurance payments because the amount of the pension received from the base period employer exceeded the unemployment insurance payments that were to be paid.

126 Cong. Rec. S12901 (daily ed. September 18, 1980) (remarks of Senator Bradley). In this example, the entire amount of the pension is offset against the unemployment benefits. Rivera points out that the Bradley example is not necessarily inconsistent with his interpretation of section 3304(a)(15)(A)(ii). Under Rivera's interpretation, it would be proper to offset the entire amount of the pension in the Bradley example if the claimant did not become eligible for the pension until his base period employment. If, however the claimant became eligible for his pension prior to the base period and the pension increased during the base period, then the offset would only be the amount of the base period increase under Rivera's interpretation. The problem with Rivera's interpretation is that it assumes Senator Bradley left a crucial fact out of his example. Regardless, we again rely on the language of the statute and not the legislative history.

We agree with the district court. The wording of the statute does not permit another construction. Section 3304 (a)(15) provides for an offset of the full amount of any pension described in section 3304(a)(15)(A)(i) and (ii).

In the case of private pensions, section 3304(a)(15)(A)(ii) specifies that the offset applies if the base period "services . . . affect eligibility for, or increase the amount of" the pension. It does not specify that the offset applies only to the increase effected by the base period employment.

V

EQUAL PROTECTION

Rivera argues that if section 3304(a)(15)(A)(ii) is interpreted to require an offset of the total amount of any pension benefits which increased as a result of base period employment, then it violates the Constitution's equal protection guarantee. He argues that there is no conceivable rational basis for offsetting the full amount of pension benefits of a claimant whose pension increased slightly as a result of his base period employment, while not offsetting any part of the amount of the pension benefits received by a claimant whose pension is unaffected by his base period employment.

Under the equal protection clause, the classifications in 3304(a)(15)(A) must only bear a rational relationship to a legitimate state interest. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). The Supreme Court has explained the application of this test as follows:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78.

> "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426.

Dandridge v. Williams, 397 U.S. 471, 485 (1970). It is not necessary to show that the classification "precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute." *Weinberger v. Salfi*, 422 U.S. 749, 777 (1975).

The district court found that the lines drawn by section 3304(a)(15)(A) passed constitutional muster, even though in some cases they produced apparently inequitable results. In the district court's view, Congress had several purposes, not always consistent with each other. Congress was attempting to (1) eliminate the possibility of a truly retired worker collecting unemployment benefits, (2) "avoid forcing employers to be concurrently responsible for both unemployment insurance and pension benefits arising from the same period of employment," (3) "preserve the program's fiscal integrity by tightening eligibility standards," and (4) create classifications that could be easily administered. 524 F.Supp. at 145-46. The district court determined that, although the classifications in section 3304(a)(15)(A) may not do a perfect job of sorting, they are justified by their ease of administration. *Id.* at 146.

We agree with the district court's analysis. Section 3304(a)(15)(A) is not violative of the equal protection clause for the reasons given by the district court. 524 F.Supp. at

145-47; *see Cabais v. Egger*, 527 F.Supp. 498, 502-03 (D. D.C. 1981), *aff'd and rev'd on other grounds*, 690 F.2d 234 (D.C. Cir. 1982).

VI

RETROACTIVE APPLICATION

Rivera argues that applying the pension offset requirements of section 3304(a)(15) to pensions which vested prior to April 1, 1980, the effective date of that section, is an impermissible retroactive application of the pension offset law. He argues that "since many workers . . . had bargained with their employers in the expectation that once their pensions vested they would be entitled to receive their full pension benefits plus unemployment insurance in the event they were later fired or laid off from their jobs, the Secretary's application of the pension offset law attached a new disability to a transaction that was already past, and was therefore retroactively applied." *See Sturges v. Carter*, 114 U.S. 511, 519 (1885). Rivera goes on to argue that under *Bradley v. School Board*, 416 U.S. 696 (1974), retroactive application is prohibited on these facts because it would be "manifestly unjust."

The district court correctly rejected this argument. 543 F.Supp. at 1175-76. There is nothing in the language of the statute or its legislative history to indicate that it was not intended to apply to pensions which vested before April 1980. Indeed, the plain language of section 3304(a)(15) applies to all pensions, regardless of when they vest. Furthermore, this is not a case of retroactive application. In section 3304(a)(15), Congress did not alter anyone's vested pension rights; it adjusted the manner in which public benefits would be distributed in the future.

VII

CONCLUSION

It was not necessary for the Secretary to comply with the notice and comment procedure before issuing UIPL Directive No. 7-81. The Secretary's interpretation of the social security and private pension offset provisions of 26 U.S.C. § 3304(a)(15)(A) is correct. Section 3304(a)(15)(A) does not violate the equal protection clause, nor is it an impermissible retroactive application of the law.

Costs are awarded to the Secretary.

AFFIRMED IN PART and REVERSED IN PART.

Appendix B

In the United States District Court
for the Northern District of California

No. C-80-3469 RFP

Michael Rivera, on behalf of himself and all
others similarly situated,
Plaintiffs,

v.

Douglas X. Patino, individually and in his
capacity as Director of
California Employment Department;
Raymond Donovan, individually and in his capacity
as Secretary, United States Department of Labor,
Defendants.

[Filed May 6, 1982]

MEMORANDUM AND ORDER

A. PROCEDURAL POSTURE OF THE CASE

Plaintiffs filed suit to invalidate federal and state statutes which are, in effect, identical. These statutes, 26 U.S.C. § 3304(a)(15) and Cal. Unemp. Ins. Code § 1255.3, mandate reductions in unemployment insurance benefits corresponding to the receipt by the worker of pension payments and/or social security retirement benefits. Plaintiffs also sought to invalidate a directive issued by the United States Department of Labor and a similar directive issued by the California Employment Development Department. Each of these directives interprets and enforces the appropriate contested statute.

In their First Amended Complaint, plaintiffs claimed that the statutes are unconstitutional, that the federal and state directives violate congressional intent, and that the federal directive is null and void for failure to comply with the publication requirements of the Administrative Procedure Act.

In our order of July 9, 1981, as amended on July 15, 1981, we held that the federal and corresponding state statute were not unconstitutional. *Rivera v. Patino*, 524 F. Supp. 136 (N.D. Cal. 1981). However, we held that United States Department of Labor UIPL Directive 7-81, which explains to states how to apply the federal pension offset statute, is null and void for failure to comply with the publication requirements of the Administrative Procedure Act. We ordered the Secretary to cease enforcement of the directive unless and until it was published pursuant to the procedures outlined in 5 U.S.C. §§ 553(b), (c), and (d). Since it was conceivable that the remainder of plaintiff's claims could become moot through proper publication of either UIPL Directive 7-81 or of a different implementing directive, we stayed further proceedings in this action until such publication. Thus, we did not address the question whether the voided federal directive was an unwarranted interpretation of the federal statute and was contrary to congressional intent. Neither did we address that question as to the parallel state directive.

Despite the fact that the federal directive is now void, the State of California continues to follow the state directive, because it believes that directive to be consistent with the federal and state statutes. Thus, the question whether the state directive is contrary to con-

gressional intent has not been mooted by our imposition of the stay. Because members of the plaintiff class are currently governed by an actively implemented state directive which may be an unwarranted interpretation of the federal and state statutes, we now lift the stay as to the state defendant, and proceed to consider certain aspects of the state directive, as requested by plaintiffs.

The state directive in question, Employment Development Department Field Office Directive No. 80-223 UI (November 7, 1980), construes the state pension offset statute, Cal. Unemp. Ins. Code § 1255.3. Our task at present is limited to determining whether this state directive is consistent with the intent of the California state legislature in enacting Cal. Unemp. Ins. Code § 1255.3. However, it is clear that Cal. Unemp. Ins. Code § 1255.3, which is, in effect, identical to the federal pension offset statute, was formulated by the state legislature solely in order that the State of California might maintain certification from the United States Department of Labor—a prerequisite both to federal reimbursement of the state's cost of administering its unemployment insurance program, 42 U.S.C. § 501 *et seq.*, and to the tax credit employers receive against the federal payroll tax, 26 U.S.C. § 3301 *et seq. See generally Rivera v. Patino, supra*, 524 F. Supp. at 140-41.[1] In order to maintain certification, then, the state legislature intended Cal. Unemp. Ins. Code

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[1]That the state pension offset statute was intended to be identical to the federal pension offset statute is apparent from the very language of the state statute:

> (a) Except as provided by subdivision (c), the amount of unemployment compensation benefits, extended duration benefits, and federal-state extended benefits payable to an individual for any week which begins after March 31, 1980, and which

§ 1255.3 to be construed in the same manner as the federal pension offset statute, 26 U.S.C. § 3304(a)(15). Thus, in construing the *state* statute, we must look to the proper construction of the *federal* statute. If the state directive is consistent with the intent of Congress in enacting the federal pension offset statute, it will also be consistent with the intent of the state legislature in enacting the state pension offset statute. Conversely, if the state directive is inconsistent with congressional intent in enacting the federal pension offset statute, it will also be inconsistent with the legislative intent underlying the state statute, and will be subject to being struck down as contrary to the intent of the state legislature. For this reason, the federal pension offset statute, and the con-

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begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced, but not below zero, by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week.

(b) The provisions of subdivision (a) shall be operative only during such time as Section 3304 of the Federal Unemployment Tax Act requires that state unemployment insurance laws contain such provisions as a condition of certification of state unemployment insurance laws by the Secretary of Labor.

(c) The reduction of benefits specified in subdivision (a) shall be limited by the provisions of any amendment to paragraph (15) of Section 3304(a) of the Federal Unemployment Tax Act, enacted before January 1, 1981, which mandates or permits a limitation on the reduction of unemployment compensation benefits by the amount of pension, retirement or retired pay to an individual, as described in subdivision (a). This subdivision shall only apply to benefits paid after the effective date of the amendment to paragraph (15) of Section 3304(a) of the Federal Unemployment Tax Act.

Cal. Unemp. Ins. Code § 1255.3.

gressional intent underlying this statute, is the primary focus of our inquiry.

B. BACKGROUND OF THE FEDERAL PENSION OFFSET STATUTE

In 1976, Congress, concerned that certain retirees who had no intention of returning to work were collecting unemployment insurance benefits,[2] enacted 26 U.S.C. § 3304(a)(15).[3] That provision required states participating in the cooperative federal/state unemployment insurance compensation scheme to reduce a retiree's unemployment insurance benefits, dollar for dollar, by the amount of governmental or private retirement payments the retiree was receiving. Initially scheduled to become effective on September 30, 1979, the amendment's effective date was extended to March 31, 1980, "because of concern that the [1976] provision may have been too broadly drawn," 126 Cong. Rec. S2095 (daily ed. March 4, 1980) remarks of Senator Boren).

Congress ultimately did decide that the 1976 provision, which required that *all* recipients of retirement pay be subject to the offset, was ineffective in distinguishing those who were genuinely retired and had no intention of rejoin-

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[2] *See, e.g.*, 122 Cong. Rec. 33279-80 (1976) (remarks of Senators Long and Bartlett).

[3] 26 U.S.C. § 3304(a)(15) states in relevant part:

> [T]he amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or to any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week.

ing the work force, from those who, despite having been forced into retirement, needed to re-enter the work force in order to meet their expenses. Senator Boren explained the problem with the 1976 amendment—and how his proposed amendment would rectify it—as follows:

> [I]f a person has been working for a particular employer and he retires and starts receiving a pension from that employer, he cannot go down to the unemployment office and start drawing benefits as if he is unemployed. He is not unemployed. He is retired and he is drawing a pension from his last employer.
>
> This would keep that provision of current law. However, it would take care of the situation which [sic] a person might have earlier in life worked for a particular employer, let us say for 20 years. He starts to draw his pension, which is not enough to live on. He takes another job and works for the second employer for, let us say, 10 years and then, because of an economic downturn, he is thrown out of work. Well, clearly, in that situation, he should not be denied the right to receive unemployment compensation because he might be drawing a pension for work which he finished doing for another employer some 10 or 15 years before. So the bill corrects that provision of the current law.

126 Cong. Rec. S2095 (daily ed. March 4, 1980) (remarks of Senator Boren).[4]

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[4]Also pertinent are the following remarks by Senator Javits:

> If a claimant has retired from an employer with a pension and has then taken another job, he or she has certainly demonstrated current labor market attachment and an intent to work. So application of the pension offset in these circumstances is unfair and unnecessary to prevent the abuse of the UI system by retirees that has been alleged.

126 Cong. Rec. S2101 (daily ed. March 4, 1980) (remarks of Senator Javits). *See also id.* at S2096 (remarks of Senator Dole).

Thus, shortly after the 1976 version of section 3304(a)(15) became effective, it was amended by section 414 of the Multi-employer Pension Plan Amendments Act of 1980. Effective as of 1981, section 3304(a)(15)(A) now provides:

> § 3304. Approval of State Laws
>
> (a) Requirements.—The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that—
>
> . . .
>
> (15) the amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay annuity, or other payment, which is reasonably attributable to such week except that—
>
> (A) the requirements of this paragraph shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if—
>
> (i) such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period employer or chargeable employer (as determined under applicable law), and
>
> (ii) in the case of such a payment not made under the Social Security Act or the Railroad

> Retirement Act of 1974 (or the corresponding provisions of prior law), services performed for such employer by the individual after the beginning of the base period (or remuneration for such services) affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar payment.

Stated more simply, sections (A)(i) and (A)(ii) specify the conditions under which unemployment benefits are to be reduced by pension payments and by social security and railroad retirement benefits. As to social security and railroad retirement benefits, (A)(i) requires offset only of benefits paid under a plan which the base period employer[3] "maintained . . . or contributed to." As to private pensions, again, (A)(i) requires offset only of payments made under a plan which the base period employer "maintained . . . or contributed to"; and (A)(ii) imposes an additional requirement that the pension increased (or the worker gained eligibility) as a result of services performed during the base period.

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[3]In all states, the "base period"—that is, the period of employment during which eligibility for unemployment insurance benefits is accrued—is four calendar quarters.

> A "base-period" employer is an employer who paid wages on which the U.I. eligibility of the claimant and the amount and duration of unemployment benefits is based. In 37 States [including California; see Cal. Unemp. Ins. Code § 1275], the "base period" is the first 4 of the last 5 completed calendar quarters prior to the filing of a U.I. claim . . .

H.R. 96-538, 96th Cong., 1st Sess. 5 (1979).

C. ALLEGED INCONSISTENCIES BETWEEN THE STATE DIRECTIVE AND THE FEDERAL STATUTE

Plaintiffs argue[6] that the state directive misconstrues the pension offset statute in three ways,[7] resulting in the improper offsetting of pension payments and social security benefits against unemployment insurance benefits.

The first issue concerns the proper construction of 26 U.S.C. § 3304(a)(15)(A)(ii).[8] Plaintiffs contend that (A)(ii) should be interpreted as requiring that only the amount by which private pension benefits *increased during the base period* should be offset against unemployment insurance benefits. Instead, the state directive interprets (A)(ii) as requiring that, once the conditions of (A)(i) and (A)(ii)

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[6]Many of plaintiffs' arguments were actually raised in the briefs of *amicus curiae* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Plaintiffs have incorporated these arguments, by reference, into their present motion.

[7]In the First Amended Complaint, plaintiffs raise two additional claims, concerning the allegedly improper treatment of periodic pension payments and lump sum pension payments under the state directive. Plaintiffs have not asked us to reach these claims in the present motion to lift the stay against the state defendant. Consequently, it is unnecessary to reach these questions at the present time.

[8]As we noted above, our discussion will focus primarily upon the federal pension offset statute, with the understanding that the proper construction of the federal statute *is* the proper construction of the parallel state pension offset statute.

are met, private pensions must be offset in their entirety.[9] Defendant argues that the state directive correctly construes (A)(ii). For the reasons given below, we agree with defendant. Section (A)(ii) does not limit the offset of private pension payments to the increase in those payments attributable to the base period.

The second issue concerns the proper offset of social security benefits. The question is whether social security benefits attributable to services performed for a *nonbase period employer* may be offset against unemployment in-

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[9]The Suggested Sample Statements in Attachment 4 of Employment Development Department Field Office Directive No. 80-223 UI (November 7, 1980) make it clear that the Employment Development Department does require an offset of the entire amount of a pension payment once the conditions of 26 U.S.C. § 3304(a)(15)(A)(i) and (A)(ii) have been met. One such sample statement is the following:

> B. WBA REDUCED—NO CLAIMANT CONTRIBUTION TO PENSION (For pensions other than Social Security or Railroad Retirement)
>
> You are receiving pension payments which are based on your prior work, from a plan maintained by, or contributed to by, a base period employer. Evidence indicates that services performed after the beginning of the base period of your claim either affected your eligibility to receive the pension or increased the amount of your pension. Evidence also indicates that you did not contribute to the fund from which your pension is paid. Consequently, *the total amount of your pension payments is considered deductible income under Section 1255.3 of the Unemployment Insurance Code*. Therefore, your unemployment insurance weekly benefit amount must be reduced by your pension payments of (1) $, as computed on a weekly basis.

(Emphasis added.)

surance benefits.[10] Plaintiffs contend that if a worker employed by Company A leaves the company after having worked a sufficient number of quarters to become eligible for social security benefits and then obtains employment with Company B, and is ultimately laid off by Company B, the social security benefits attributable to work performed for Company A should not be offset against the unemployment insurance benefits attributable to work performed for Company B. The state directive requires that, under those circumstances, the social security benefits be offset.[11] Defendant argues that the directive correctly construes the federal statute in this regard. We find for plaintiffs on this issue.

The third issue concerns pensions which vested prior to April 1, 1980, the effective date of 26 U.S.C. § 3304(a)(15). Plaintiffs contend that these pensions should not be offset against unemployment insurance benefits. The state directive does not make any exception for them, and so

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[10]In the First Amended Complaint, plaintiffs also address that question as it applies to private multi-employer pension funds. Like the questions of the proper treatment of periodic and lump sum payments, *see* footnote 7, *supra*, the multi-employer pension fund issue has not been raised in the present motion to lift the stay against the state defendant. Consequently, we do not address it at this time.

[11]The state directive provides, in relevant part:

> Where an individual works during his/her base period for an employer who contributes to a multi-employer pension fund (e.g., Social Security, union pension fund, etc.), and the individual then receives a pension from that multi-employer pension fund, the entire pension can be part of the pension offset (not just that portion attributable to a given employer).

Employment Development Department Field Office Directive No. 80-223 UI, 2 (November 7, 1980).

requires that they be offset in the same manner as pensions which vest subsequent to the effective date of the statute. Defendant supports the state directive in this respect. We are in agreement with defendant's view that even pensions which vested prior to April 1, 1980 are subject to offset.

1. The Proper Measure of the Offset Under (A)(ii)

As noted above, plaintiffs contend that where an offset of a private pension is mandated by the federal statute, (A)(ii) provides that only the amount of the increase in pension benefits attributable to services performed during the base period should be offset against unemployment insurance benefits.[13] We reject that contention for the reasons stated below. If an offset of a private pension is mandated by the statute as a whole, then (A)(ii) does not limit the size of the offset.

a. *Plain meaning of (A)(ii).* Section 3304(a)(15) states that unemployment insurance benefits are to be offset by an amount equal to "periodic payment[s] . . . based on . . . previous work"—that is, periodic retirement payments. Sections (A)(i) and (A)(ii) add two conditions which must be satisfied before an offset of a private pension payment against unemployment insurance benefits may occur. The first condition is stated by (A)(i), which provides that such an offset can only occur when the pension payment is made "under a plan maintained (or contributed to) by a base period employer." The second condition, stated by (A)(ii), provides that such an offset can only occur when services performed for the

[13]It should be noted that, as (A)(ii) is applicable only to private pensions, plaintiffs' first issue relates only to such pensions.

base period employer during the base period "affect eligibility for, or increase the amount of, such pension." If both conditions are fulfilled, the pension payments are offset against the unemployment insurance benefits. The language of (A)(ii) thus appears merely to state one of two conditions which must be satisfied before the offset of pension payments must occur. The language does not suggest that, as plaintiffs contend, (A)(ii) alters the *amount* of the offset.

However, this finding does not necessarily end our inquiry. The Ninth Circuit's position on the significance of the plain meaning of a statute has been most recently stated in *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868 (9th Cir. 1981):

> When the meaning of statutory language is unclear, one must look to the legislative history. When the statutory language is clear, and there is no reason to believe that it conflicts with the congressional purpose, then legislative history need not be delved into, unless it is brought to the court's attention that there is within the legislative history something so probative of the intent of Congress as to require a reevaluation of the meaning of the statutory language.

Id. at 871 (footnote omitted).

The Ninth Circuit has also noted that "[r]esort to legislative history is not inappropriate where application of the 'plain meaning' rule would lead to an unreasonable result 'plainly at variance with the policy of the legislation as a whole.'" *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 710 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). Plaintiffs suggest that there is reason to believe that the plain meaning of

(A)(ii) conflicts with congressional intent, and would lead to an unreasonable result. Thus, before resorting to legislative history, we first examine plaintiffs' argument that the offsetting of the entire amount of a pension that meets the conditions set forth in (A)(i) and (A)(ii) would lead to an unreasonable result contrary to the policy of the federal pension offset legislation as a whole.

Plaintiffs argue that, in enacting section 3304(a)(15), Congress was primarily concerned with eliminating the "double-dip"—that is, with preventing a worker from receiving two forms of compensation as a result of work performed during the same period. The 1976 provision required that *all* retirement payments be offset against unemployment insurance benefits. This was a crude method of preventing double-dipping, because retirement benefits would be offset even if they were attributable to services performed before the worker's most recent employment. Thus, a worker who retired from Company A and began receiving retirement benefits, then worked for Company B, was laid off, and began receiving unemployment insurance benefits, would be required to offset the retirement benefits from Company A against the unemployment insurance benefits from Company B.

The overly broad 1976 provision was amended to specify the conditions in which offset is appropriate. Section (A)(i) specified that retirement benefits would be offset only if the base period employer had maintained or contributed to the retirement plan. Plaintiffs argue that the addition of (A)(i) by the Senate was a corrective measure designed to correlate more closely the offsetting of pension benefits with the base period, and so to ensure

that the worker did not receive two forms of compensation as a result of work performed during that period.

Plaintiffs go on to argue that, standing alone, even the method established by (A)(i) was inexact, because it focused only on whether the retirement payments were generally *maintained by the base period employer*, and not on whether the retirement payments received from the base period employer *resulted from the base period employment*. Thus, plaintiffs argue that the House added (A)(ii) in order to ensure that an offset would occur only if pension payments were actually attributable to services performed during the base period, and thus to correlate the offset of pension payments still more accurately with the base period.[13]

Finally, and most importantly for purposes of the present discussion, plaintiffs argue that Congress intended to take a final step in accurately correlating the offset of pension payments with the base period. Plaintiffs contend that Congress intended to offset only the amount of the pension actually attributable to services performed during the base period, since only that portion of the pension results from work which actually establishes eligibility for unemployment insurance benefits. Because, plaintiffs argue, Congress enacted (A)(ii) as a means of ensuring that offsets of pension payments were accurately correlated with the base period, Congress must not have intended for fractions of pension payments *unrelated* to services performed during the base period to be offset against unemployment insurance benefits that *were* related to services performed

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[13]As will be demonstrated below, defendant essentially concurs with plaintiffs up to this point.

during that period. Defendant, of course, disagrees. Its position is that where the conditions of (A)(i) and (A)(ii) have been met, the *entire* pension payment should be offset; not just the portion of the payment attributable to work performed during the base period.

In short, in suggesting that Congress intended to limit the amount of the offset to that fraction of the pension payment attributable to work performed during the base period, plaintiffs argue that the primary policy consideration resulting in the enactment of (A)(i) and (A)(ii) was an ameliorative one and that the plain meaning of (A)(ii) would defeat that purpose. Indeed, plaintiffs have called our attention to several passages within the legislative history indicating that, in enacting that section, Congress wished to mitigate the harshness of the 1976 amendment, which had refused unemployment insurance benefits to many persons who were technically retirees, and yet who had been forced to re-enter the work force only to be laid off. *See, e.g.*, 126 Cong. Rec. S2095 & 2104 (daily ed. March 4, 1980) (remarks of Senator Boren); *id.* at S12900-01 (daily ed. September 18, 1980) (remarks of Senator Bradley). In light of these passages within the legislative history which suggest that the plain meaning of (A)(ii) is at variance with the policy behind the enactment, we are justified in resorting to a more detailed scrutiny of the legislative history.

Before proceeding to that analysis, however, it may be useful at this stage to set forth defendant's interpretation of the purpose of (A)(ii).

Defendant's construction of (A)(i) and (A)(ii) is somewhat in accord with plaintiffs', up to a point, although

defendant focuses on the employer rather than the employee. Defendant asserts that Congress intended to ensure that employers would not have to *pay* for both pensions and unemployment insurance benefits where both were attributable to work performed during the same period. A base period employer must make contributions to the state unemployment insurance fund when a worker who performed services for that employer during the base period collects unemployment benefits. A base period employer may also be contributing to that worker's pension during the base period. Therefore, there is a possibility that an employer, absent any offset provision, may be funding unemployment insurance benefits and pension payments attributable to the same work. This view of the problem is, of course, a mirror image of the view taken by plaintiffs. Each view takes as its premise that Congress was concerned with preventing the payment of both pensions and unemployment insurance benefits attributable to the same period in which the worker performed services. Just as the total amount the worker received is reduced through an offset of pension payments against unemployment insurance benefits, so the employer's contribution is reduced by the amount of the offset.

The historical analysis suggested by plaintiffs is consistent with defendant's view as well. The 1976 statutory provision eliminated duplicative payments by employers. However, it did so in a crude manner, offsetting all retirement payments against unemployment insurance benefits, regardless of whether the base period employer contributed to the retirement payments. Section (A)(i) altered the 1976 provision to require offset only where a pension was maintained by a base period employer. This offset was

to occur even though the employer might not have contributed to the pension *during* the base period. Thus, although (a)(i) rendered the correlation between employer contributions into pension plans and into the unemployment insurance fund somewhat more exact, the correlation was still imperfect. For example, if (A)(i) stood alone, offset would occur even where, by the time the base period began, the employer had ceased contributing to the pension plan because contributions to the pension before the onset of the base period had caused the payments to reach the maximum allowable under the plan. Defendant asserts that the House added (A)(ii) to correct this possible result of (A)(i). With the addition of (A)(ii), if a pension has reached its maximum before the base period and the employer thus does not contribute to the pension during the base period, there is no offset, since the employer is not subject to duplicative financial liability as a consequence of the base period employment.[14] An offset in such a context would give the base period employer an uncontemplated financial exemption, and so is disallowed.

Defendant, then, agrees with plaintiffs that Congress intended accurately to determine when a duplicative payment was made, by correlating pension payments during the base period with payment of unemployment insurance benefits during the same period. However, defendant

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[14]This explains why social security benefits are excluded from the "pension enhancement" limitation of (A)(ii). While private pension plans require employer contributions only until a certain level of funding has been reached, social security benefits are funded by a tax that must be paid on a continuous basis. Accordingly, an employer will always pay social security taxes during the base period. Thus, enhancement would constitute an unnecessary condition for offsetting social security benefits.

asserts that Congress intended to prevent duplicative payments by offsetting the worker's entire pension, rather than by offsetting only those fractions of the pension attributable to services performed during the base period. Defendant suggests three possible policies behind section 3304 which would account for this construction of (A)(ii). First, defendant argues that Congress was concerned with administrative convenience, as it would be difficult to determine which portion of a pension payment was attributable to services performed during the base period. Second, defendant suggests that Congress was concerned with maintaining the fiscal integrity of the unemployment compensation program. Third, defendant contends that Congress intended pension payments which had increased during the base period to be offset in their entirety because even a small fractional increase in a pension payout renders the employer liable for a far greater additional payment *into* the pension fund. Thus, defendant argues, the full offset was intended to provide substantial practical relief to employers subject to duplicative payments.

b. *Legislative history.* The legislative history of (A)(ii) makes it clear that Congress intended the provision to be construed in the manner suggested by defendant.

The joint conference committee report was adopted by the Senate on September 18, 1980. Senator Bradley delivered the last speech from the floor before the conference report was approved. He offered four examples explaining the operation of (A)(i) and (A)(ii). His second example supports defendant's construction of the statute.

> A worker at company A retires at age 65 after 35 years of service there and begins collecting a pension

> of $600 per month. He then unsuccessfully seeks new employment and files an unemployment insurance claim. The State computes this individual's unemployment benefit rate at $130 per week, or $520 per month, because of the past earnings reported to the State. This individual would not be eligible for unemployment insurance payments because the amount of the pension received from the base period employer exceeded the unemployment insurance payments that were to be paid.

126 Cong. Rec. S12901 (daily ed. September 18, 1980) remarks of Senator Bradley).

In the Bradley example, the entire amount of the pension is offset against the unemployment insurance benefits. No attempt is made to ascertain what fraction of the pension is attributable to the base period, and to reduce the unemployment insurance benefits by only that amount. Thus, in order for plaintiffs' construction to be in conformity with Senator Bradley's example, it would have to be assumed that the entire pension of $600 per month is attributable to services performed during the base period. Yet the example states that the worker had been employed by the base period employer for 35 years. It is unlikely that the final year of employment alone could account for such a large pension. Consequently, the pension must represent retirement benefits accrued throughout the worker's history with the company. The fact that Senator Bradley stated that the $600 should be offset in its entirety against the unemployment insurance benefits indicates that he did not intend the amount of the offset to be limited to the amount of the pension attributable to the base period.

His example is thus inconsistent with plaintiffs' construction of (A)(ii).

Moreover, throughout the legislative history of (A)(i) and (A)(ii), there are indicators that Congress was only defining the conditions under which the offset should occur; and that, once those conditions had been met, the offset should be of the same character as under the then-governing 1976 law. That is, the entire pension should be offset, dollar for dollar, against the unemployment insurance benefits. For example, the report of the conference committee which produced the final version of the statute states:

> The House amendment to the Senate amendment to the bill provides that *the pension offset requirement of existing unemployment law* would only apply to a pension which is paid under a plan maintained or contributed to by a base period employer and which is increased by reason of services performed after the beginning of the base period.

126 Cong. Rec. H9101 (daily ed. September 18, 1980) (Joint Explanatory Statement of the Committee of Conference) (emphasis added), reprinted at 4 Cong. & Admin. News 3066-67 (1980). The language of the conference report makes it clear that the conference committee members intended that, once the offset was deemed applicable, it would be offset as under then-existing law.

Similarly, the language of the participants in the debates indicates that a full offset was contemplated by all. See, for example, the remarks by Senator Williams shortly before the Senate agreed to the conference report:

> Except in the case of retirement benefits received under the Social Security Act or the Railroad Retire-

> ment Act, the pension offset would not apply when post-retirement income did not effect either eligibility for or the amount of the pension maintained or contributed to by a base-period of [sic] chargeable employer.

126 Cong. Rec. S12900 (daily ed. September 18, 1980) (remarks of Senator Williams). Senator Williams' comment is typical, in that the members of Congress consistently referred to "*the* offset," either without defining the term or by defining it with reference to the 1976 provision. The construction suggested by plaintiff would be a dramatic departure from the 1976 pension offset procedure, which provided for a dollar-for-dollar offset of the entire pension. If Congress had contemplated such a departure, someone surely would have said so.

Furthermore, it is not clear that a full offset of pensions is inconsistent with Congress's intent to ameliorate the harsh effects of the 1976 enactment. The punitive aspect of the 1976 statute which Congress sought to alleviate by enacting (A)(i) and (A)(ii) was the fact that, under the 1976 law, unemployment insurance benefits were reduced, dollar for dollar, by *any* retirement payment, even when the recipient of the payment, although technically "retired" from a job with Company A, had in fact been forced to seek reemployment with Company B, and had then been laid off. Sections (A)(i) and (A)(ii) were designed to ensure that such individuals, who had never intended to leave the work force and were still actively seeking employment, would not be penalized for the receipt of retirement payments from Company A. The 1980 amendments do prevent that punitive result. As such, they fulfill the only ameliorative purpose Congress expressly

intended. We can find nothing to indicate that Congress intended further to ameliorate the effect of the 1976 provision by reducing the *amount* of the offset of private pensions.

Plaintiffs do point to one piece of legislative history in support of their construction. However, even that is inconclusive. During the House debate over the 1980 amendments, Representative Weiss stated that the purpose of (A)(ii) was to "clarif[y] . . . a Senate-passed amendment that aids older workers." 126 Cong. Rec. H7905 (daily ed. August 26, 1980) (remarks of Rep. Weiss). That Senate amendment was (A)(i). Plaintiffs argue that (A)(ii)'s "clarification" must have changed (A)(i) so as to allow only the offset of the increase of pension payments attributable to services performed during the base period. However, it is not at all evident that the clarification was meant to have that effect. As discussed earlier, plaintiffs' construction depends on two propositions. First, that Congress intended to establish a correlation between the offset of pension payments and the base period, so that an offset would occur only if the worker received pension payments attributable to services performed during the base period. Second, that Congress intended to make this correlation "exact" by offsetting only those *portions* of the pension payments attributable to services performed during the base period. Both parties appear to agree that the first proposition is correct. The remarks of Representative Weiss seem directed toward that proposition, in that, while (A)(i), standing alone, would have permitted the offset of benefits attributable to services performed *before* the base period, (A)(ii) only permits offset where the benefits

are attributable to services performed *during* the base period. Thus, it seems that (A)(ii) "clarified" (A)(i) by more closely correlating the offset of pension benefits with the base period. However, there is no indication that the clarification referred to by Representative Weiss required that only the increase of the pension payments attributable to the base period be offset against unemployment insurance benefits.

In sum, the plain meaning of (A)(i) and (A)(ii) is that only if two conditions are met can private pensions be offset: first, the pension plan is maintained by the base period employer; and second, the pension payments are enhanced as a result of services performed during the base period. The provisions do not suggest that the *amount* of the offset is to be limited to the amount by which the pension was enhanced during the base period. Apparently the showing of pension enhancement is merely required in order to ensure that the worker is truly receiving duplicative payments and that the base period employer is truly subject to duplicative financial liability for unemployment insurance benefits and pension contributions. The legislative history, insofar as it touches upon this question at all, supports the view that Congress intended the amount of the offset—once the offset is triggered—to be the same as under the previous, 1976 provision. That is, the entire amount of the pension should be offset, dollar for dollar, against the unemployment insurance benefits. This is the construction which the state defendant has given to (A)(ii). We find that the state directive is not, in this respect, inconsistent with the federal statute, and thus is not inconsistent with the intent of the state legislature in enacting the parallel state statute. Accordingly,

summary judgment is granted for the defendant, and denied for the plaintiffs, on this issue.

2. The Proper Offsetting of Social Security Benefits Under (A)(i)

The parties offer differing construction of (A)(i) as it applies to the offset of social security benefits. (A)(i), again, states:

> (A) the requirements of this paragraph shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if—
>
> (i) such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period employer or chargeable employer (as determined under applicable law) . . .

The state directive, which defendant supports, construes (A)(i) as requiring that when a worker receiving social security benefits as a result of employment with Company A re-enters the work force to perform services for Company B and is then laid off by Company B, the worker's social security benefits must be offset in their entirety against any unemployment insurance benefits resulting from the layoff. Plaintiffs contend that this construction of (A)(i) is inconsistent with the intent behind the provision, which was to require the offset of only those retirement benefits to which the base period employer (Company B in our example) contributed, and not to offset benefits to which a previous, nonbase period employer contributed.

Plaintiffs are correct in their general statement of the intent underlying (A)(i), as examples given in the legislative history clearly demonstrate. One such example concerned a proposed amendment, reported out of the Senate

Finance Committee, which was virtually identical to the final version of (A)(i).[15] As noted earlier in this opinion, Senator Boren discussed the difference between the original 1976 provision and the Finance Committee amendment as follows:

> [I]f a person has been working for a particular employer and he retires and starts receiving a pension from that employer, he cannot go down to the unemployment office and start drawing benefits as if he is unemployed. He is not unemployed. He is retired and he is drawing a pension from his last employer.
>
> This would keep that provision of current law. However, it would take care of the situation which [sic] a person might have earlier in life worked for a particular employer, let us say for 20 years. He starts to draw his pension, which is not enough to live on. He takes another job and works for the second employer for, let us say, 10 years and then, because of an economic downturn, he is thrown out of work. Well, clearly, in that situation, he should not be denied the right to receive unemployment compensation because he might be drawing a pension for work which he finished doing for another employer some 10 or 15 years before. So the bill corrects that provision of the current law.

126 Cong. Rec. S2095 (daily ed. March 4, 1980) (remarks of Senator Boren). This example is in accord with plain-

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[15]The Senate Finance Committee amendment provided, in relevant part:

> (A) the requirements of this paragraph shall only apply in the case of a pension, retirement or retired pay, annuity, or other similar periodic payment under a plan maintained (or contributed to) by a base period or chargeable employer (as determined under the State law) . . .

126 Cong. Rec. S2092 (daily ed. March 4, 1980).

tiff's argument that, through (A)(i), Congress intended to ensure that workers would no longer lose unemployment insurance benefits because of the receipt of a pension earned through service for an earlier, non-base period employer.

Senator Boren's view of the Finance Committee amendment was shared by Senator Dole. In discussing the proposed amendment, he, like Senator Boren, contrasted the amendment to the 1976 provision:

> The offset provision was too broadly drafted in the original legislation and would penalize many legitimately unemployed individuals simply because they had earned pension benefits from a previous employer. Under the bill, only that portion of a pension contributed by the employer to whom the unemployment is attributable is required to be offset. This should assure that individuals who are actually unemployed rather than retired will not be penalized while conversely assuring that individuals who are, in fact, retired are not drawing unemployment benefits.

Id. at S2096 (remarks of Senator Dole). Again, these remarks make clear the congressional intent that benefits attributable to nonbase period employers not be offset. *See also* Senator Bradley's third example, 126 Cong. Rec. S12901 (daily ed. September 18, 1980) (remarks of Senator Bradley).

The preceding examples are addressed to the question of the proper offsetting of *private* pensions. A third example makes it clear that Congress also intended that *social security* benefits attributable to nonbase period employers be exempt from offset. That example was given in the discussion of the version of (A)(i) which was approved by

the conference committee and was ultimately enacted. This final version of (A)(i) had been co-authored by Senators Chafee and Bradley. *See* 126 Cong. Rec. S12901 (daily ed. September 18, 1980) (remarks of Senator Bradley). As noted above, Senator Bradley delivered the last speech from the floor, just prior to the Senate adoption of the conference report. He gave four examples of how (A)(i) would operate. His first example is relevant to the question whether it is proper to offset social security benefits attributable to a nonbase period employer.

> [A]n individual at company A retires and begins to collect social security. For whatever reason, this person then goes to work for company B and, after 6 months there, is terminated. Assuming the individual is eligible for unemployment insurance because of the work done at company B, the level of unemployment insurance compensation will not be reduced at all. This is because the base period employer is not the same as the social security employer. The offset would apply, however, if the individual had returned to work for company A instead of working for company B. Under those circumstances, the base period employer and the social security employer would be the same.

Id. This example clearly demonstrates that social security benefits attributable to a nonbase period employer are not to be offset against unemployment compensation arising from employment with a base period employer.[16]

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[16]Indeed, Senator Bradley's example goes even farther. It indicates that, in the context of the example, *no* amount of the social security benefits is to be offset, not even the amount, if any, attributable to base period employer Company B. Technically, of course, because the worker in Senator Bradley's example is receiving unemployment insurance compensation and some small fraction of social

Defendant, however, urges a different interpretation of the Bradley example. Defendant maintains that base period employer Company B must not have been paying social security taxes at all. It must have been paying into the unemployment insurance fund only. If it *had* been contributing to social security, defendant contends, the offset certainly would have occurred in the example, because the base period employer would have been making duplicative payments. This interpretation of the example, however, assumes a great deal when it assumes that Senator Bradley's Company B was exempt from paying social security taxes for its employees. Most employers are required to pay

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security benefits attributable to the same period of employment, an offset of that portion of the social security benefits which represents a duplicative payment would be appropriate. (See our discussion, *supra*, of the proper interpretation of 26 U.S.C. § 3304(a)(15)(A)(ii).) However, calculating the amount of the worker's social security benefits attributable to the work performed for the base period employer would be an exceedingly complex and difficult task. Social security benefits are computed by averaging wages earned during a number of the worker's highest wage earning years. While a worker achieves insured status after having accumulated a specified number of quarters of coverage, the amount of benefits payable to a fully insured worker may increase by a small amount if the worker earns a high salary in later years. Thus, in Senator Bradley's example, the worker's social security benefits may have increased slightly as a result of work performed for base period employer Company B. However, it seems clear from Senator Bradley's example that, because of the administrative difficulty of computing the amount of social security benefits attributable to the base period employer in the example, Congress did not intend this *de minimis* amount to be offset against the worker's unemployment insurance compensation. Since, as our discussion in the text indicates, Congress also did not intend the offset of social security benefits attributable to *non*-base period employers, it follows that Congress intended *no* amount of the worker's social security benefits to be offset against unemployment insurance compensation in the circumstances illustrated by Senator Bradley's example.

such taxes. In the absence of any suggestion to the contrary in Senator Bradley's example, we assume that the Senator was referring to a company which does pay social security taxes. Thus, in his example, Senator Bradley did mean that, even where the base period employer pays social security taxes, no offset of the worker's social security benefits should occur.

From the start of the legislative process, then, the intent of the Senate was clear. A provision virtually identical to (A)(i) was interpreted as not requiring the offset of retirement benefits attributable to contributions by a nonbase period employer. The version of (A)(i) which prevailed in the joint conference committee was the Senate version.[17] Senator Bradley was the last to discuss the operation of (A)(i) before the conference report was approved. He set forth a specific example of the operation of the amendment which indicates that Congress made a decision not to offset social security benefits against unemployment insurance compensation where the base period employer is a different employer from the one which employed the individual during the period in which he or she achieved fully insured status.[18] Accordingly, we hold that the state directive is contrary to the congressional intent underlying (A)(i) in that it requires the offset of social security benefits in the

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[17]The conference report departed from the Senate's proposed amendment only in one respect: the inclusion of (A)(ii), a House amendment. *See* 126 Cong. Rec. H9101 (daily ed. September 18, 1980) (Joint Explanatory Statement of the Committee of Conference), reprinted at 4 U.S. Cong. & Admin. News 3066-67 (1980); 126 Cong. Rec. S12900 (daily ed. September 18, 1980) (remarks of Senator Williams).

[18]Of course, where the worker retires from Company A, collects social security benefits, resumes working for *Company A*, and then

context of a worker who, following the vesting of social security benefits as a result of work performed for one company, goes to work for a different company and then becomes eligible for unemployment insurance benefits. Under those circumstances, no offset of social security benefits should occur. Since the state directive is inconsistent with the federal statute in this respect, it also contravenes the intent of the state legislature in enacting Cal. Unemp. Ins. Code § 1255.3. Thus, plaintiffs' motion for summary judgment on this point is granted against the state defendant. Defendant's cross motion is denied.

3. The Offsetting of Pensions Which Vested Prior to the Effective Date of 26 U.S.C. § 3304(a)(15)

The state directive provides that unemployment insurance benefits must be reduced by the offsetting of even those pensions which vested prior to the effective date of 26 U.S.C. § 3304(a)(15), April 1, 1980. Plaintiffs contend that this interpretation of the statute is unwarranted because it deprives workers of vested rights in contravention of the spirit of the nonforfeiture provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1053(a). It may well be impermissible to *reduce pension payments* by the amount of unemployment insurance benefits received. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 521 (1981). However, as we made clear in our order of July 9, 1981, vested pension rights are not impaired by the state's interpretation of the pension offset

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is laid off and attempts to collect social security benefits, the offset *will* occur. This is because "[u]nder those circumstances, the base period employer and the Social Security employer would be the same." 126 Cong. Rec. S12901 (daily ed. September 18, 1980) (remarks of Senator Bradley).

statute. The worker always receives the full amount of the pension to which he or she is entitled. The offset only acts to *reduce unemployment insurance benefits* by the amount of pension payments—not vice versa. As we noted in our earlier opinion, "We assume that this [reduction in income] . . . will seem equally unfortunate to the unemployment insurance claimant as it would if his pension and not his unemployment insurance were reduced. It is inescapable, however, that the rights and duties created by plaintiffs' pension contracts are not affected by the statute." *Rivera v. Patino, supra,* 524 F. Supp. at 144. Similarly, they are not affected by the state directive.

Plaintiffs suggest that the decision of the Supreme Judicial Court of Maine in *Mailman v. Colonial Acres Nursing Home,* 420 A.2d 217 (1980), provides authority for this court to refuse to construe the statute "retroactively" to affect pensions that have vested. That case does not provide such authority. There, a worker suffered an accident and became eligible for worker's compensation from May 1, 1976, until November 28, 1976. The worker was also found eligible for worker's compensation for a period beginning on October 1, 1978, and for unemployment compensation for the period from October, 1978, through April, 1979. Her employer and its insurance carrier appealed from the Worker's Compensation Committee's award of the worker's compensation benefits. In September, 1979, a state law had become effective which required the reduction of worker's compensation benefits by the amount of any unemployment compensation received by the worker during the period of the award. Appellants claimed that the court should apply that statute retroactively to their case, which was pending on the effective date of the offset statute. This would have

resulted in some reduction of the worker's compensation award. The court held for the worker that the new state law was not to be applied retroactively to reduce worker's compensation benefits awarded prior to the effective date of the statute. That case is distinguishable from the present one. The state pension offset directive does not require the reduction of any benefits awarded prior to the effective date of the federal statute. It only requires that unemployment insurance benefits awarded *subsequent* to the effective date of the statute be reduced, where appropriate.

We also note that there is no support in the legislative history for plaintiff's contention that the statute does not apply to pensions which vested prior to the effective date of the statute. Indeed, such a limitation would drastically reduce the impact of the federal statute in a manner which Congress does not appear to have intended. It seems clear that the original 1976 provision was designed to prevent abuses of the unemployment compensation program by some retirees, and so maintain the fiscal integrity of the program. *See, e.g.*, 122 Cong. Rec. 33280-81 (1976) (remarks of Senator Bartlett). Congress was plainly concerned with *immediately* reducing the amount of unemployment benefits paid to those recipients who were receiving duplicative retirement payments. And yet, plaintiffs' construction of the statute would mean that it might be many years before the statute had full effect. Pensions often vest well before a worker reaches retirement age. Thus, were plaintiffs' construction accepted, for many years to come, numerous pensions would be exempt from offset simply because they had vested long before the effective date of the statute, as well as before the worker's retirement. Given the urgency with which Congress sought to implement the

pension offset provisions, we doubt that such a delay was intended.

Thus, we find that the state directive, in providing that unemployment insurance benefits must be reduced even by those pensions which vested prior to the effective date of the federal pension offset statute, is not inconsistent with the federal statute. As such, it is also not inconsistent with the state statute. Summary judgment is granted as to defendant, and denied as to plaintiffs, on this point.

D. SUMMARY

In conclusion, we hereby grant summary judgment in favor of defendant on the following two issues:

The state directive does not contravene the intent of the state legislature by requiring the offset of the full amount of pension payments against unemployment insurance benefits where the conditions of both 26 U.S.C. § 3304(a)(15)(A)(i) and (ii) are met.

The state directive does not contravene the intent of the state legislature by requiring the offset of even those pension payments attributable to pensions which vested prior to the effective date of the federal pension offset provision on April 1, 1980.

We hereby grant summary judgment in favor of plaintiffs on the following issue:

The state directive contravenes the congressional intent underlying 26 U.S.C. § 3304(a)(15)(A)(i), by requiring the offset of social security benefits in the context where a worker who leaves a company after having worked a sufficient number of quarters to become eligible for social secu-

rity benefits goes to work for a different company, and then becomes eligible for unemployment insurance benefits as a result of services performed for the second employer. No amount of the social security benefits received by the worker is to be offset against the unemployment insurance benefits under these circumstances. Since the state directive requires such offsets, it contravenes the intent of the state legislature in enacting Cal. Unemp. Ins. Code § 1255.3. Accordingly, that portion of the state directive which requires such an offset is hereby declared to be null and void. State defendant is permanently enjoined from enforcing Employment Development Department Field Office Directive 80-223 UI (November 7, 1980) insofar as it requires the offset of social security benefits in the context where a worker, who, following the vesting of social security benefits as a result of services performed for one company, goes to work for a different company, then becomes eligible for unemployment insurance benefits as a result of services performed for the second employer. State defendant is hereby ordered to restore to plaintiff class members any unemployment insurance benefits that would have been paid but for the implementation of the portion of state directive 80-223 which we have found to be inconsistent with the intent of the state legislature.

SO ORDERED.

Dated: May 6, 1982

/s/ Robert F. Peckham
Chief United States
District Judge

Appendix C

In the United States District Court
for the Northern District of California

No. C-80-3469 RFP

Michael Rivera, Peter Nevarez, on behalf
of themselves and all others similarly situated,
Plaintiffs,

v.

Douglas X. Patino, individually and in his capacity
as Director of California Employment Department,
and F. Ray Marshall, individually and in his capacity
as Commissioner of the IRS.
Defendants.

[Filed July 9, 1981]

MEMORANDUM AND ORDER

This case involves the statutory reduction of unemployment benefits by recently-enacted pension offset provisions. The newly-enacted state and federal provisions require that certain pensions be offset dollar-for-dollar against unemployment insurance benefits for which the pensioner would otherwise be eligible. Thus, a worker who accrued a pension at one job, retired, found that the pension was not sufficient to meet his needs, found another job, and then was laid off from that second job, might be denied all or part of the unemployment insurance benefits which he would otherwise have accrued at that second job.

As discussed in this memorandum, we hereby award summary judgment against plaintiffs and in favor of defendants as to plaintiffs' constitutional claims. Further, we

award summary judgment in plaintiffs' favor and against defendants as to the validity of UIPL 7-81 because that directive is void as a result of the Secretary's failure to publish it in the Federal Register and afford interested parties an opportunity to comment. As is also discussed below, we grant plaintiffs' motion for class certification, and hold that notice to the absent class members prior to resolution of the questions decided herein is unnecessary. Finally, we stay further proceedings in this action until after the Secretary promulgates implementing regulations pursuant to the procedures specified in this order.

I. FACTS

Plaintiff Rivera sues on behalf of himself and others similarly situated. He is a 72-year-old retired auto worker. Finding that his $380.00 a month Social Security pension, plus his $110.00 a month auto industry pension, were not enough to meet his expenses, he took a part-time job as a mechanic, earning about $100.00 a week. Eventually, he was laid-off from this job, and applied for unemployment insurance benefits which, but for his pensions, would have amounted to $54.00 a week. His second employer was considered a Social Security "base period employer" (see below), meaning that he continued to accrue Social Security pension benefits while working for this employer. By the time he was laid-off, therefore, his Social Security pension had risen to $408.00 a month. Under the new pension offset rules, the fact that his unemployment insurance base period employer was also a Social Security contributor meant that his *entire* Social Security pension (*not* just the increase accrued while working for this employer) was to be offset against unemployment insurance benefits. His

small automobile industry pension was also offset, making him ineligible for unemployment insurance benefits. He was therefore unable to meet his bills.

II. OVERVIEW OF THE UNEMPLOYMENT INSURANCE SYSTEM AND THE PENSION OFFSET PROVISIONS WHICH ARE THE SUBJECT OF THIS ACTION

It is important to keep in mind that unemployment insurance is a system of "cooperative federalism," in which each state receives federal funds to reimburse its costs of administering the program, and employers receive a federal tax credit for the unemployment insurance tax they pay. To receive these federal benefits, a state's program *must* meet certain federal requirements. Federal law sets forth minimum eligibility requirements, but a state is free to impose stricter requirements. Thus, under the new statute, states must offset certain pensions against unemployment insurance benefits in order to maintain federal certification, but if Congress were to repeal the pension offset provision, the state of California could still enact and enforce an identical provision.

In this case, however, California's pension offset provision seems to have been enacted solely in response to federal coercion. It tracks the federal language and contains a "self-destruct" clause stating that the California provision shall remain in effect only as long as it is required under Federal law.

The original federal pension offset provision, enacted in 1976, required the states to offset *all* work-related pensions

against unemployment insurance benefits, beginning on April 1, 1980. The California conforming language precisely tracked the federal language, and added:

> The provisions of this section shall be operative only during such time as § 3304 of the Federal Unemployment Tax Act requires that state unemployment insurance laws contain such provisions as a condition of certification of state unemployment insurance laws by the Secretary of Labor.

Cal.Un.Ins.C. § 1255.3(b)

On September 26, 1980, the pension offset rule (26 U.S. § 3304(a)(15)) was amended and significantly limited. The amendment provided that pensions were required to be offset only if:

> (i) such pension . . . is under a plan maintained (or contributed to) by a base period employer or chargeable employer, and
>
> (ii) in the case of such payment not made under the Social Security Act or the Railroad Retirement Act . . . services performed for such employer by the individual after the beginning of the base period (or remuneration for such services) affect eligibility for, or increase the amount of, such pension . . .

The applicable unemployment insurance "base period" varies from state to state. In all states it is some four of the last five calendar quarters before the individual applies for unemployment benefits. The "base period employer" is taxed if his employee becomes eligible for benefits. The amendments quoted above seem to have been designed to require the offset only of pensions to which a "base period employer," who would already be contributing to the employee's unemployment insurance benefits, had contributed.

Stating the amendments in simpler words, it would seem that they require offset only of (1) Social Security and Railroad Retirement pensions which the base period employer had "maintained or contributed to," and (2) other pensions which the base period employer had maintained or contributed to *and which had increased (or become vested) as a result of services performed for that employer during the base period.*

In anticipation of the above federal amendment, the California legislature passed an "urgency statute" which amended the corresponding state pension offset provision. *See* A.B. No. 2239 (Statutes of 1980, Ch. 1174). It provided:

> (c) the reduction of benefits specified in subdivision (a) shall be limited by the provisions of any amendment to Paragraph 15 of Section 3304(a) . . . which . . . permits a limitation on the reduction of unemployment benefits by the amount of any pension. . . . This subdivision shall only apply to benefits paid after the effective date [of any such federal amendment].

Thus, both pieces of California's conforming legislation strongly indicate that the legislature imposed pension offsets on California workers only under Federal compulsion.

The California pattern of bending to Federal compulsion in the matter of pension offsets continued at the administrative level. On October 9, 1980, the Department of Labor issued a "Directive" instructing the state agencies what pensions must be offset under the Federal amendment. Thereupon the California Employment Development Department issued *its* field office directive, which tracked the

federal directive. The federal directive provided, among other things, that:

1. a private pension that increases because of work during the base period must be offset in its entirety, not just in the amount of the increase;

2. a Social Security pension must be offset in its entirety if the base period employer paid Social Security taxes, even if the base period employer did not employ the individual during any period affecting his eligibility for or the amount of his Social Security pension;

3. private pensions must be offset even if they vested before the effective date of the statute, April 1, 1980;

4. monthly pensions must be offset (on a pro rata basis) in weeks during which no pension payment is received.

Plaintiff (and the UAW) contend that these interpretations of the statute are unwarranted and, in any case, would render it unconstitutional. They also contend that the Department of Labor Directive is null and void for failure to comply with the publication requirements of the Administrative Procedure Act and/or the Freedom of Information Act. Plaintiffs also assert several constitutional challenges, based on (1) equal protection, in that the distinctions between pensions that are offset and those that are not have no rational basis; (2) the contract clause; and (3) deprivation of property without due process. Plaintiffs also seek class certification. Defendants move for summary judgment or dismissal, raising a number of issues involving standing and jurisdiction as well as issues concerning the merits. We will discuss the "avoidance" issues, the "merits" issues, and the motions for injunctive relief and class certification in that order.

III. DISCUSSION

A. "Avoidance" Issues: Standing and Jurisdiction

1. Standing

The federal defendant moves to dismiss on the theory that plaintiffs lack standing to challenge the federal statute and directive because their injury, if any, results from enforcement of the *California* statute, and there is no showing that invalidation of the parallel federal provision would redress this injury. The theory seems to be that, since the states do not have to participate in the cooperative federal-state unemployment insurance system at all, the federal government may with perfect impunity require participating states to impose illegal eligibility rules upon their residents. We do not agree.

The case law makes it quite clear that an intended beneficiary of a cooperative federal-state assistance program, such as unemployment insurance or Medicaid, has the right to seek judicial review of federally-imposed eligibility requirements. *See, e.g., Harris v. McRae*, 100 S.Ct. 2671 (1980); *Williams v. Zbaraz*, 100 S.Ct. 2694 (1980); *Grace Brethern Church, et al. v. State of California*, N.D. Cal. No. 79-93 (1980); *Tongol v. Usery*, 601 F.2d 1091 (9th Cir. 1979); *Martinez v. Marshall*, 573 F.2d 55 (9th Cir. 1977). Defendants' suggestion is so far from the actual rule that, in one case where the plaintiff asserted a federal statutory challenge to the state's administration of its unemployment insurance program, and failed to join the Secretary of Labor as a defendant, the Supreme Court suggested that he do so in order that complete relief might be accorded. *California Dept. of Human Resources v. Java*, 402 U.S. 121 at 135, n.19 (1971).

While there have been cross-currents to this rule, *see, e.g., Northern New England Conference of Seventh Day Adventists v. State of New Hampshire*, No. 80-266-L (D.N.H. July 17, 1980); *State of New Hampshire Department of Employment Security v. Marshall*, 616 F.2d 240 (1st Cir. 1980), we do not find these cases persuasive, particularly where, as here, the legislative history of the state enactments suggest quite strongly that they were enacted solely as a result of federal compulsion. In contrast to the situation in *State of New Hampshire Dept. of Employment Security v. Marshall, supra*, where the state refused to comply with FUTA, in this case the state of California acted quickly to comply with federal requirements. The case is distinguishable from *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), where the immediate providers of benefits (*i.e.*, hospitals, who had been given a tax benefit for providing care to the needy) had given no indication whether or not their behavior would be influenced in any way by the repeal of the federal statutory incentive to provide benefits to the needy. Because of the "self-destruct" features of the California legislation, it is quite clear that there is a "fairly traceable causal connection between the claimed injury and the challenged conduct." *Arlington Heights v. Metropolitan Housing Dev. Corporation*, 429 U.S. 252, 261 (1977).

Therefore, the federal defendant's motion to dismiss for lack of standing is denied.

2. The Tax Injunction Act

Defendants contend that, because the decision in this case might affect the amount of state unemployment insurance taxes—that is, a judgment in plaintiffs' favor might result

in increasing those taxes—the Tax Injunction Act, 28 U.S.C. § 1341, divests this court of jurisdiction to award injunctive or declaratory relief. If this were true, the federal courts could not have asserted jurisdiction in any of the vast number of reported cases which involve challenges to the denial of unemployment insurance or Medicaid benefits. The purpose of the Tax Injunction Act, however, was to prevent the federal courts from interfering with the states' ability to collect sufficient revenue. *See Rosewell v. LaSalle Nat'l Bank*, ... U.S. ....., 49 U.S.L.W. 4285, 4292 (March 24, 1981). Every court considering the question whether it had jurisdiction to issue an injunction which might have the effect of *raising* state taxes has therefore determined that it did. *See, e.g., Hargrave v. McKinney*, 413 F.2d 320 (5th Cir. 1969); *Cornelius v. Benevolent Protective Order of Elks*, 382 F.Supp. 1182 (D. Conn. 1974); *Grace Brethren Church v. State of California, supra. Stockton Metropolitan Ministry v. Glick*, Civ. No. S-80-807, and the other cases on which defendants rely, are all distinguishable, because in each case the plaintiff challenged a tax assessed against him and a decision in his favor would have the effect of reducing state tax revenues. Accordingly, we find that the Tax Injunction Act does not deprive this court of jurisdiction, and deny defendants' motion to dismiss.

B. "Merits" Issues

1. Impairment of Contract

Defendants argue that, as a matter of law, the disputed statutory provision cannot, as plaintiffs claim, operate to impair plaintiffs' constitutionally protected contract rights. We agree, and order that the contract claim be dismissed.

The "contract clause" of the United States Constitution provides that "No State shall . . . pass any . . . law impairing the obligation of contracts. . . ." U.S. Const., Art. I, section 10, Cl. 1. The clause operates against the Federal government through the due process clause of the fifth amendment. *Lynch v. U.S.*, 292 U.S. 571 (1934).

In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Court set forth a three-step test to determine whether legislative action violates the contract clause. First, there must be in existence a valid contract or obligation of a contractual nature. Second, the obligation must have been "impaired." Third, the impairment must not have been reasonable or necessary. In the instant case, plaintiffs fail to clear the first hurdle.

It is true that a statute may create a contractual obligation which is protected by the contract clause "when language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the state." *United States Trust Co., supra*, at 17, n.14. However, not every statute creating an entitlement to public benefits or creating obligations on the part of the government creates rights of a contractual nature. *See, e.g., Northwestern National Life Insurance Co. v. Tahoe Regional Planning Agency*, 632 F.2d 104 (9th Cir. 1980); *Even v. Clifford*, 287 F.Supp. 334 (D.C. Cal. 1968) (statute setting forth method of induction into active military service did not create enforceable contractual right). Some private and public employees' pension plans created or governed by statute have been held to create contract rights. *See, e.g., Wyper v. Providence Washington Insurance Co.*, 533 F.2d 57 (2d Cir. 1976); *Pineman v. Oechslin*,

494 F.Supp. 525 (D. Conn. 1980). Similarly, a public employee's reliance interest in a continued salary level as embodied in legislation has been held to be protected by the contract clause. *See, Fisk v. Police Jury of Jefferson*, 116 U.S. 131, 133-34 (1885). All of these cases dealing with employee benefits have one fundamental characteristic in common which is lacking in the instant case: in each, it was crucial that the employee had given "consideration" in exchange for pension or other rights, by contributing to the pension and/or by "agreeing not to quit" in exchange for continued pension or other rights. In this case, there is nothing in the nature of a voluntary, bargained-for exchange between any of the parties involved (i.e., the employees, employers, the state government, and the federal government). Employers' contributions to the unemployment insurance fund are a tax, reflecting an exercise of the police power; there is nothing voluntary about them. *See, Martinez v. Socoma Cos., Inc.*, 11 Cal.3d 394, 401 (1974). Similarly, it cannot be said that the expectation of unemployment insurance coverage acts—as a pension might—as an inducement to the employee to remain at a particular job. Unemployment insurance is not bargained for in any way; pension rights, on the other hand, vary significantly from one job to another. Plaintiffs and amicus vigorously argue that the statute unconstitutionally deprives workers of pension rights that have vested, and that in this respect it violates § 1053 of the Employee Retirement Income Security Act ("ERISA"), as well as the contract clause. We cannot deny that the practical effect of the statute on those in plaintiffs' position is to reduce their income. We assume that this result will seem equally unfortunate to the unemployment insurance claimant as it would if his pension and not his

unemployment insurance were reduced. It is inescapable, however, that the rights and duties created by plaintiffs' pension contracts are not affected by the statute. *Compare, Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), in which the statute, by its express terms, imposed new duties upon employers with respect to their pension plans. *Alessi v. Raybestos-Manhattan, Inc.*, 49 U.S.L.W. 4503 (May 18, 1981), is also distinguishable. That case involved a challenge to provisions in private pension plans which required workers' compensation benefits to be offset against pensions for which the plaintiffs would otherwise be eligible. The case suggests that a similar provision requiring the offset of unemployment insurance benefits might be improper under ERISA's non-forfeiture provisions. *See, id.* at 4507. *Alessi*, however, did not involve a challenge to *legislative* action. Further, the challenged pension plan provisions required a direct reduction of vested pension benefits. In this case, the set-off legislation, by its terms, reduces *unemployment insurance benefits* by the amount of any pension benefits and not vice versa.

Amicus also argues with some force that pension and other employee benefits are hard won at the bargaining table, at which the employer's potential liability for unemployment insurance benefits is taken into account. The parties have therefore entered their private contracts in reliance upon the unemployment insurance benefit levels then in force. As explained above, however, the unemployment insurance system confers no contractual right to continued benefit levels. Moreover, most if not all business contracts must be based in part upon the assumption that the statutory climate in which they are negotiated will not undergo any drastic change. If it does so change, the par-

ties may have a defense of legal impossibility to the performance of their contractual obligations, but they will rarely have any claim against the government. Such a claim based on reliance on the current statutory state of affairs is especially unlikely where, as here, the legislature has expressly reserved the right to "amend or repeal such law at any time." 26 U.S.C. § 2204(a)(17).

We therefore find, as a matter of law, that the unemployment insurance program does not create contract rights which are cognizable under the contract clause of the United States Constitution. Plaintiffs' claims based on the contract clause must therefore be dismissed.

2. Equal Protection/Due Process

Plaintiffs contend that the defendants are violating the equal protection clause and/or the due process clause of the United States Constitution (1) by offsetting pensions contributed to by the base period employer but not those where the base period employer made no contribution; (2) by treating Social Security and Railroad Retirement benefits in a more restrictive manner than other pensions; (3) by offsetting some pensions but not offsetting other forms of income (*e.g.*, stock dividends); (4) by offsetting the *full* amount of a pension when a base period employer's contribution has increased the amount of the pension, but not offsetting pensions which became fully vested before the beginning of the base period, even though the base period employer may have made contributions to the pension fund; (5) by requiring a full pension offset when the base period employer contributes to a multiemployer pension plan, even when such contributions do not affect eligibility

for a pension, while offsetting other pensions only when the base period employer's contributions have affected pension eligibility or amount; and (6) by requiring that pensions paid periodically be offset in each week in which a payment is received, or prorated so that there is an offset in each week, while offsetting pensions that are paid in one lump sum only in the one week in which payment is received rather than a pro rata basis. In addition, plaintiff argues that the pension offset provision violates his right to due process because requiring pension offsets bears no rational relation to any legitimate government purpose, or because it creates an irrebuttable presumption that persons receiving pensions are no longer in the work force or are no longer in need of unemployment insurance benefits. We find that the statute as construed by defendants is not unconstitutional under either the due process or the equal protection clause of the United States Constitution.

The applicable test for determining whether any of the classifications enumerated above violates the equal protection clause of the constitution is whether the classification bears a rational relationship to a legitimate state interest. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Similarly, the test for determining whether the set-off provisions (or any irrebuttable presumptions they create) violate the due process clause is whether they are "justifiable on any conceivable rational basis." *Vlandis v. Kline*, 412 U.S. 441, 458 (1973). Plaintiff appears to concede, as he must, that since no suspect classification or fundamental right is involved in any of the classifications mentioned above, this court could not properly subject any of the classifications to equal protection "strict scrutiny." He does suggest, how-

ever, that the irrebuttable presumptions created by the statute should be subjected to exacting review because they abridge plaintiff's fundamental right to work. It is by no means clear that the right to work is such a fundamental right, *see Board of Regents v. Roth*, 408 U.S. 564 (1972), but we need not reach this question because neither practically nor legally does the disputed legislation deny plaintiff the right to pursue employment.

Hence, both the equal protection and the due process issues are subject to traditional "rational basis" analysis. We cannot question the wisdom or fairness of the legislature's policy judgments, but may only determine whether those judgments have any conceivable rational basis. We find that there is such a rational basis for each of the classifications which plaintiff challenges, and for the overall offset provision and any irrebuttable presumptions it creates, and, therefore, that the offset provisions pass constitutional muster.

It bears repeating that our inquiry must be limited to the question whether "any state of facts either known or which could reasonably be assumed" supports the pension offset system. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). Plaintiff bears the burden of negating every conceivable fact which might rationally support the legislation as the Secretary has construed it. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1972). Several conceivable purposes for the offset provisions can easily be identified. For example, it is quite apparent that the legislature sought to eliminate the possibility that a worker who was actually retired rather than still available for work, could collect unemployment insurance benefits.

At the same time, the legislature made a broad, and perhaps imperfect, judgment that a pensioner's need for unemployment insurance benefits is less urgent than that of other claimants. The legislature quite apparently also wished to avoid forcing employers to be concurrently responsible for both unemployment insurance and pension benefits arising from the same period of employment. Yet another apparent purpose of the system is to preserve the program's fiscal integrity by tightening eligibility standards. And an overarching purpose served by the breadth of the various classifications which have been made is ease of administration. Although these classifications may not serve the legislature's primary purpose in each and every individual claimant's case, the classifications can be justified by their ease of administration. *See, Richardson v. Belcher,* 404 U.S. 78, 84 (1971); *Vance v. Bradley,* 440 U.S. 93, 109 (1979); *Weinberger v. Salfi,* 422 U.S. 749 (1974). Avoidance of costly individual eligibility determinations, which would deplete the program's resources, justifies the admittedly harsh results which may befall some claimants. *See, Idaho Dept. of Employment v. Smith,* 434 U.S. 100, 101 (1977) (upholding disqualification of day but not night students from unemployment benefits). In an area of economics and social welfare such as this, a classification "does not offend the Constitution simply because it 'is not made with mathematical nicety or because in practice it results in some inequality' . . . ." *Dandridge v. Williams,* 397 U.S. 471, 485-86 (1970).

Both state and federal courts have found that similar purposes formed rational bases for legislation requiring the offset of some kinds of income against certain public benefits. *See generally,* Annot., 56 ALR 3d 520, 526 (1974)

(Supp. 1980); see also, *Richardson v. Belcher*, 404 U.S. 78 (1971) (upholding the offset of workers' compensation but not private insurance benefits against Social Security Disability Insurance benefits.)

Since we find that considerations of administrative convenience justify all of the various classifications which plaintiff challenges, we need not discuss each of those classifications in great detail. We think it important to note however, that special considerations form rational bases for some of the challenged features of the pension offset system. This is true even of the Secretary's interpretation of the statute which, of course, is far broader than plaintiff's.

For example, the "base period-pension enhancement" feature, (pursuant to which pensions other than Social Security and Railroad Retirement pensions are offset only if (1) they are received from an unemployment insurance base-period employer, *and* (2) they are "enhanced" during the base period) limits the potentially double impact on employers of periods of high unemployment. Perhaps it is unwise and sometimes unfair to offset the entire pension amount even when a pension has been only minimally enhanced during the base period, but this system obviates the need for complex and costly individual calculations of benefit levels. However unequal treatment of some individual claimants may be under this plan, our limited function in this constitutional analysis is to determine whether there is any conceivable rational basis for the plan, not whether we believe it is the wisest and fairest possible system.

Plaintiffs also complain that Social Security and Railroad Retirement pensions are treated "more harshly" than other pensions because they are offset whether or not they are enhanced as a result of base period work, as long as the base period employer has "maintained or contributed to" them. This difference in treatment does not render the statute or the Secretary's interpretation of it constitutionally infirm. It can be justified on the same rationale that justifies the "pension enhancement" feature of the offset system—that is, it also prevents employers from being concurrently responsible for benefits during one period of employment. This is because an employer must *always* contribute to the Social Security program based on each employee's earnings, while his financial responsibility for a private pension may cease under the pension plan once the pension has fully vested. Moreover, social security and private pensions are fundamentally different from one another, and this difference forms a rational basis for variations in treatment. Private pensions are negotiated by contract, are paid from private funds, and can be viewed as deferred compensation for work, while Social Security and Railroad Retirement benefits, like unemployment insurance benefits, are controlled by statutes which can be amended at any time, are paid from a public resource which is rapidly being depleted, and are more easily seen as public insurance, expressing legislative concern for the aged and needy, rather than as deferred compensation. Thus, Congress could conceivably have viewed these benefits as more truly duplicative of unemployment benefits than private pensions, and therefore decided to accord them "harsher" treatment.

Plaintiff also argues that defendants' failure to prorate pensions that are "enhanced" during the base period, so

that only the "enhancement" is offset, and their failure to prorate lump sum pensions so as to treat their recipients like periodic pensioners, constitutes a denial of equal protection. We must repeat that, however unfair we might believe the pension "enhancement"—total offset rule to be, we may not require Congress to draw its lines with mathematical precision, or as we ourselves might draw them. In this case, ease of administration will justify the lack of precision, and the inequities it doubtless produces. As to the proration of lump sum pensions, defendants urge that such pensions may, in fact, be prorated as the states' option. Assuming that this is not true, however, and that Congress has failed to provide for the proration of lump sum pensions, it does not constitute a denial of equal protection. Although such proration might serve Congress's avowed and apparent purposes, "a statute is not invalid . . . because it might have gone farther than it did . . . [r]eform may take one step at a time, addressing itself to that phase of the problem which seems most acute to the legislative mind. . . ." *New Orleans v. Duke*, 427 U.S. 297, 305 (1975).

Our role in this constitutional analysis is sharply limited by separation of powers principles, which require us to uphold the legislature's policy judgments if there is any rational basis for them, and to refrain from substituting our own. Accordingly, and for the above reasons, we grant summary judgment in favor of defendants and against plaintiff as to his constitutional claims.

3. UIPL Directive No. 7-81

Finally, plaintiff challenges UIPL Directive No. 7-81, which explains to the states how they should apply the new pension offset rule. Plaintiff argues that the directive

is null and void for failure to comply with the publication requirements of the Administrative Procedure Act. We agree that the directive is void for failure to publish, and therefore decline to reach the question whether the directive is inconsistent with the statute which it purports to interpret. Instead, we order the Secretary to cease enforcing UIPL Directive No. 7-81 unless and until it is published pursuant to the procedures outlined in 5 U.S.C. §§ 553(b), (c), and (d). Since publication of this or another implementing directive could conceivably moot plaintiff's claims, we stay further proceedings in this action until after such publication. *See, Kelly v. U.S. Department of Interior,* 339 F.Supp. 1095, 1102 (E.D. Cal. 1972).

It is fundamental that administrative regulations are void unless they are promulgated in strict compliance with the Administrative Procedure Act, 5 U.S.C. § 533. This Circuit has long insisted upon scrupulous conformity with the Act. *See, e.g., Hotch v. U.S.,* 212 F.2d 280 at 283-84 (9th Cir. 1954). Even seemingly technical or pro-forma publication requirements must be strictly enforced because these requirements afford an opportunity for an exchange of ideas among regulating agencies, regulated citizens, and experts in the field being regulated. During an age in which resentment against "big government" is running high, and a debate about the proper role of the federal government in social welfare programs is raging with unprecedented furor, it is especially important that agencies administering such social welfare programs avail themselves of the guidance which interested members of the public can offer.

We disagree with the Secretary's contention that the directive is exempt from any publication requirements either because it relates solely to public benefits (553(a)(2)), or because it is merely an interpretive rule or general statement of policy (§ 553(b)(A)). Administrative rules, like this one, having a substantial impact upon private rights may not be made without notice and comment procedures, even if the rule is exempt from § 553.

We doubt that the UIPL directive is, as the Secretary contends, an interpretive rule within the meaning of § 553(b)(A). The directive is finally determinative of the rights of thousands of unemployment insurance claimants, and of the obligations of states which wish to continue to participate in the cooperative state-federal unemployment insurance program. There is nothing "tentative" about the directive: it does not merely announce the Secretary's "tentative intentions for the future," *see, Pacific Gas and Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974), but imposes an immediately "binding norm," *id.*, upon state agencies and upon thousands of unemployed workers. The agency's own characterization of its statement as a "directive" quite candidly and accurately suggests that states will face the drastic consequence of decertification if they fail to comply with its terms. *See, e.g., Alabama v. Marshall*, 626 F.2d 366 (5th Cir. 1980). Such a mandatory directive to state agencies which administer a federal program cannot be considered an interpretive rule or statement of general policy. *See, Aiken v. Obledo*, 442 F.Supp. 628, 650 (E.D. Cal. 1977). Defendant argues that the directive is not mandatory on the states because a state can always choose to end its participation in the cooperative

unemployment insurance program. This disingenuous argument was implicitly rejected in *Aiken v. Obledo, supra*, at 649, a case in which not only the state's participation in the overall welfare program, but also its adoption of the challenged regulations, was voluntary. In the instant case, such drastic consequences for the State of California and its residents would follow from the state's failure to comply with the UIPL Directive, that we cannot consider the state's compliance voluntary.

However, we need not decide whether the directive is exempt from § 553 notice and comment provisions under the exception for interpretive rules and statements of general policy, because it is quite clearly exempt as a "matter relating to public property, loans, grants, benefits, or contracts." *See, Rodriguez v. Swank*, 318 F.Supp. 289 (N.D. Ill. 1970), aff'd 403 U.S. 901 (1971) (the exemption applies to rulemaking concerning the program of aid to families with dependent children). Nevertheless, we find that the rule has such a substantial impact upon the rights of private parties that it is void unless promulgated with notice and comment procedures. *See, Aiken v. Obledo*, 442 F. Supp. 628, 649-50 (1977) (even if rule would otherwise be exempt from § 553 under the exemption for "procedural" rules, it was not exempt because it had a significant impact upon those regulated); *see, also, Thompson v. Washington*, 497 F.2d 626 (D.C. Cir. 1976) (tenants in publicly supported housing entitled to notice and comment procedure with respect to rules regarding rent increases, even though literal terms of APA clearly did not apply); *Anderson v. Butz*, 550 F.2d 459 (9th Cir. 1977); *Noll v. Chapman*, 508 F.2d 1023 (2d Cir. 1975); *Texaco, Inc. v. FBC*,

412 F.2d 740 (3d Cir. 1969); *Lewis v. Weinberger*, 415 F. Supp. 652 (D.N.M. 1976); *St. Francis Mem. Hosp. v. Weinberger*, 413 F.Supp. 323 (N.D. Cal. 1976); *Pharmaceutical Manufacturers Assoc. v. Finch*, 307 F.Supp. 90 (D. Del. 1970); *National Motor Freight Traffic Assoc. v. U.S.*, 268 F.Supp. 858 (D.D.C. 1967), *aff'd per curiam*, 393 U.S. 18 (1968). This "substantial impact" test of whether a rule falls within an exception to § 553 represents an attempt to see that the purposes of the notice and comment rule are carried out, rather than employing "facile semantic distinctions" in order to determine whether a regulation is subject to notice and comment requirements. *See, Pharmaceutical Manufacturers Ass'n v. Finch, supra*, at 863. Courts have long recognized that the basic policy of the APA requires that, at least when a rule has substantial impact upon regulated individuals, notice and an opportunity for comment should be provided. Therefore, courts are free to make common law of administrative procedure which goes beyond the APA's minimum requirements. *See generally, Davis, Administrative Law of the Seventies*, § 6.01-8 (1976).

Surely the regulations now challenged would have a "significant impact" upon regulated individuals. Mr. Rivera's own case graphically demonstrates how the regulations will have the effect of reducing his income to the point where it is barely possible for him to meet his basic needs. There are thousands of California residents in similar straits. Whether or not the directive is in fact inconsistent with the statute which it purports to implement, "elementary fairness" requires that these significantly affected individuals, and other interested members of the

public, be afforded an opportunity to comment on the question. *See, Independent Broker-Dealers Trade Ass'n v. SEC*, 442 F.2d 132, 144 (CADC 1971), *cert den.*, 404 U.S. 828 (1971).

We therefore order that the Secretary cease enforcement of UIPL Directive No. 7-81 unless and until it has complied with the procedures set forth in 5 U.S.C. § 553(b), (c) and (d), and that it notify the State of California that UIPL Directive 7-81 is void and unenforceable until further notice. Since, as noted above, it is conceivable that plaintiff's claims will become moot after this publication procedure, we stay further proceedings in this action until after the directive (or other implementing regulations) are so published.

C. Class Certification

Plaintiffs move to have this action certified as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. Defendants do not dispute (and there could be no reasonable dispute) that the normal prerequisites to a Rule 23(b)(2) class action are satisfied. Defendants argue, however, that no useful purpose will be served by granting class certification, because plaintiffs seek declaratory and injunctive relief which, if granted, would effectively prevent defendants from enforcing the pension offset rules against all of the California residents who would be members of the class. Defendants cite numerous cases holding that, where injunctive or declaratory relief will similarly affect all members of the proposed class, class certification should be denied. Such a rule serves the salutary purpose of avoiding the expense, delay,

and supervision problems which attend class actions without compromising the relief that can be accorded.

Because plaintiff seeks retroactive benefits for all members of the class, however, the cases upon which defendants rely are inapposite. In *James v. Bell*, 613 F.2d 180, 186 (9th Cir. 1979), the court denied class certification in a suit challenging the constitutionality of a state elections statute since "the relief sought will, as a practical matter, produce the same result as formal classwide relief." The same cannot be said where, as here, the plaintiff seeks ancillary monetary relief for each of the members of the class. We therefore decline to apply the emerging doctrine suggested by defendants, and order that plaintiff's motion for class certification is granted.

We also find that the interests of the named plaintiffs are substantially identical to those of the class which they represent, and that, together with the International Union of United Automobile, Aerospace, and Agricultural Implement Workers of America, as *amicus curiae*, they have more than adequately represented the interests of the class with respect to the issues decided in the instant memorandum and order. *See, Alexander v. Aero Lodge No. 735, Intern. Assoc. of Machinists and Aerospace Workers, AFL-CIO*, 565 F.2d 1364, *cert. den.*, 436 U.S. 946 (1977). We are mindful that the form and timing of any notice to the class members rests in our discretion, and would consider any suggestions from the parties on this point as the action develops. However, in view of the important questions involved and the need for speedy resolution of those questions, and of the adequacy of representation afforded by the named plaintiffs, we find that the motions discussed in

the instant memorandum are properly submitted and resolved prior to any notice to the class. Should it become apparent that protection of the parties' interest or the fair and expedient conduct of this action requires notice to the class members, this court will make such orders concerning notice and participation of the class members as may be appropriate.

Accordingly, IT IS ORDERED that:

1. Plaintiffs' motion for class certification is GRANTED; and that

2. The Federal defendant's motion to dismiss is DENIED; and that

3. Summary judgment in favor of defendants and against plaintiffs, as to plaintiffs' constitutional claims, is GRANTED; and that

4. Summary judgment in favor of plaintiffs and against defendants, as to the validity of UIPL Directive 7-81 is GRANTED; and that

5. Further proceedings in this action are stayed until after the Secretary of Labor promulgates implementing regulations pursuant to the procedures specified in this Order.

Dated: July 9, 1981.

/s/ ROBERT F. PECKHAM
Chief United States District
Judge

Appendix D

In the United States District Court
For the Northern District of California

No. C-80-3469 RFP

Michael Rivera, et al.,
Plaintiffs,

vs.

Douglas Patino, et al.,
Defendants.

[Filed July 15, 1981]

Order Amending Memorandum and Order
Dated July 9, 1981

This court's memorandum and order dated July 9, 1981, is amended as follows:

1. The sentence beginning on page 1, at line 28 is deleted, and in its place is substituted "As discussed in this memorandum, the state defendants' motion to dismiss plaintiffs' constitutional claims and the federal defendants' motion for summary judgment with respect to those claims is granted."

2. The sentence beginning on page 25, at line 6 is deleted, and in its place is substituted "Summary judgment and/or dismissal in favor of defendants and against plain-

tiffs, as to plaintiffs' constitutional claims, is GRANTED; and that"

SO ORDERED.

Dated: July 15, 1981

/s/ Robert F. Peckham

Robert F. Peckham
Chief United States District Judge

Appendix E

In the United States District Court
For the Northern District of California

No. C-80-3469 RFP

Michael Rivera, on behalf of himself and all others similarly situated,
Plaintiffs,

vs.

Gloria Becerra, Director, California Employment Development Department; Raymond J. Donovan, Secretary, United States Department of Labor,
Defendants.

[Filed October 7, 1982]

STIPULATION

1. It is hereby stipulated by and between the parties that plaintiff's Second and Fourth Causes of Action, as set forth in the Amended Complaint, are dismissed without prejudice pursuant to F.R.Civ.P. 41(a)(ii).

2. It is recognized by plaintiff and federal defendant that the Court's Memorandum and Order of May 6, 1982, granting summary judgment in favor of plaintiff and against state defendant on one statutory claim, and granting summary judgment in favor of state defendant and against plaintiff on two other statutory claims is effectively dispositive of plaintiff's claims against federal defendant on these matters. That is because the question decided by the Court as to each such claim was whether 26 U.S.C. § 3304(a)(15), as amended, requires the states to offset

against unemployment insurance the pension benefits at issue. Plaintiff and federal defendant therefore hereby stipulate that judgment should now be entered in favor of plaintiff and against federal defendant on the statutory claim in which summary judgment was granted on May 6, 1982, in favor of plaintiff and against state defendant; and summary judgment should be entered in favor of federal defendant and against plaintiff on the two statutory claims in which summary judgment was granted on May 6, 1982, in favor of state defendant and against plaintiff.

This Stipulation does not foreclose any party from appealing from the accompanying Judgment which is based, in part, on the Stipulation, or from this Court's May 6, 1982 decision concerning the aforesaid claims. The parties' agreement to this Stipulation does not constitute any admission, concession, or waiver of any legal claim, defense or argument concerning the aforesaid claims.

3. It is further stipulated by and between the parties that 26 U.S.C. § 3304(a)(15), as amended, the federal pension offset provision, and California Unemployment Insurance Code § 1255.3 do not require the offset against unemployment insurance of a pension paid to a claimant on a lump sum basis. Defendant Director of the California Employment Development Department agrees not to offset against unemployment insurance any pension that is paid to a claimant on a lump sum basis. Defendant Director of the California Employment Development Department further agrees to restore to plaintiff class members any unemployment insurance benefits that would have been paid but

for the offset of a pension that was paid to a claimant on a lump sum basis.

Dated: October 6, 1982

/s/ ROBERT E. TAREN

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Attorney for Plaintiff

Dated: October 6, 1982

/s/ ASHER RUBIN

Asher Rubin
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6000 State Building
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Attorney for State Defendant

Dated: October 6, 1982

/s/ PETER W. WALDMEIR

Mark C. Rutzick
Peter W. Waldmeir,
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10th St. & Constitution Avenue, N.W.
Washington, D.C. 20530
Attorney for Federal Defendant

Dated: October 6, 1982

/s/ STEPHEN P. BERZON

Stephen P. Berzon
Altshuler & Berzon
177 Post Street, Suite 600
San Francisco, CA 94108
Attorney for UAW as
Amicus Curiae

ORDER

IT IS SO ORDERED.

Dated: October 6, 1982

/s/ ROBERT F. PECKHAM

Chief United States
District Judge

Appendix F

In the United States District Court
for the Northern District of California

No. C-80-3469 RFP

Michael Rivera, on behalf of himself and
all others similarly situated,
Plaintiff,

v.

Gloria Becerra, Director, California Employment
Development Department; Raymond J. Donovan,
Secretary, United States Department of Labor,
Defendants.

[Filed And Entered In Civil Docket Oct. 7, 1928]

JUDGMENT

This class action for declaratory and injunctive relief was brought by plaintiff Michael Rivera against the defendant Secretary of the U.S. Department of Labor and the defendant Director of the California Employment Development Department. The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) was granted leave to appear as amicus curiae. On July 9, 1981 as amended July 15, 1981, and on May 6, 1982, the Court issued Memoranda and Orders certifying the case as a class action and granting and denying various motions to dismiss and for partial summary judgment. On June 4, 1982, the Court issued a Memorandum and Order denying the federal defendant's motion for partial relief from the July 9, 1981, Order. The Court there-

after approved a Stipulation signed by the parties and amicus curiae regarding the remaining claims in this action.

In accordance with the aforementioned Memoranda and Orders and Stipulation, the Court hereby directs that judgment be entered in this matter as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) Plaintiff's motion for class certification is GRANTED. The class shall consist of all California residents whose unemployment benefits have been reduced or eliminated because of 26 U.S.C. § 3304(a)(15), as amended, California Unemployment Insurance Code § 1255.3, as amended, or U.S. Department of Labor or California Employment Development Department directives, rules, or policies implementing the aforesaid provisions.

(2) Federal defendant's motion to dismiss for lack of standing is DENIED.

(3) Federal defendant's motion to dismiss for lack of subject matter jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341, is DENIED.

(4) Summary judgment and/or dismissal in favor of federal and state defendants, as to plaintiff's claims that 26 U.S.C. § 3304(a)(15) is unconstitutional, both on its face and as applied by defendants, is GRANTED; and summary judgment in favor of plaintiff and against federal and state defendants, as to said constitutional claims, is DENIED.

(5) Summary judgment in favor of plaintiff and against federal defendant, as to the validity of Unemployment Insurance Program Letter ("UIPL") No. 7-81, dated October

9, 1980, as amended on June 9, 1981, for failure to comply with the publication requirements set forth in the Administrative Procedure Act, 5 U.S.C. § 553(b), (c) and (d), is GRANTED.

(6) Summary judgment in favor of federal and state defendants and against plaintiff, as to plaintiff's claim that, in the case of a private pension, 26 U.S.C. § 3304(a)(15)(A)(ii) does not require the offset of the entire pension but only the amount the pension increased during the base period, is GRANTED; and summary judgment in favor of plaintiff and against federal and state defendants, as to said claim, is DENIED.

(7) Summary judgment in favor of federal and state defendants and against plaintiff, as to plaintiff's claim that 26 U.S.C. § 3304(a)(15) does not require the offset of pension payments attributable to pensions that vested prior to April 1, 1980, the effective date of the federal pension offset provision, is GRANTED; and summary judgment in favor of plaintiff and against federal and state defendants as to said claim is DENIED.

(8) Summary judgment in favor of plaintiff and against federal and state defendants, as to plaintiff's claim that 26 U.S.C. § 3304(a)(15)(A)(i) does not require the offset of social security benefits against unemployment insurance for a claimant whose base period employer is a different employer from the one that employed the claimant during the period in which he or she achieved fully insured social security status pursuant to 42 U.S.C. § 414(a), is GRANTED.

IT IS HEREBY DECLARED THAT:

(9) UIPL No. 7-81, as amended, is null and void for failure to comply with the publication requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b), (c) and (d).

(10) UIPL No. 7-81, as amended, and California Employment Development Department Field Office Directive ("FOD") No. 80-223 UI (Nov. 7, 1980), insofar as they require the offset of social security benefits against unemployment insurance for a claimant whose base period employer is a different employer from the one that employed the claimant during the period in which he or she achieved fully insured social security status, are null and void.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that:

(11) Defendant Raymond J. Donovan, in his official capacity as Secretary of the United States Department of Labor, his successors in office, employees, agents and assigns, ("Secretary of Labor") is enjoined from enforcing UIPL No. 7-81, as amended, unless and until it is published pursuant to the procedures set forth in the Administrative Procedure Act, 5 U.S.C. § 553(b), (c) and (d).

(12) Defendant Secretary of Labor shall notify the State of California that UIPL 7-81, as amended, is void and unenforceable until further notice following publication pursuant to the procedures set forth in the Administrative Procedure Act, 5 U.S.C. § 553(b), (c) and (d).

(13) Defendant Secretary of Labor shall not, pursuant to 26 U.S.C. § 3304(a)(15), as amended, require the Cali-

fornia Employment Development Department to offset social security benefits against unemployment insurance for a claimant whose base period employer is a different employer from the one that employed the claimant during the period in which he or she achieved fully insured social security status pursuant to 42 U.S.C. § 414(a).

(14) Defendant Secretary of Labor shall not, pursuant to 26 U.S.C. § 3304(a)(15), as amended, require the California Employment Development Department to offset against unemployment insurance any pension that is paid to a claimant on a lump-sum basis.

(15) Defendant Gloria Becerra, in her official capacity as Director of the California Employment Development Department, her successors in office, employees, agents and assigns ("Director of Employment Development Department") is permanently enjoined from offsetting any social security benefits against unemployment insurance for a claimant whose base period employer is a different employer from the one that employed the claimant during the period in which he or she achieved fully insured social security status pursuant to 42 U.S.C. § 414(a).

(16) Defendant Director of Employment Development Department shall restore to plaintiff class members any unemployment insurance benefits that would have been paid but for the offset of social security benefits under the circumstances set forth in paragraph 15 *supra*.

(17) Defendant Director of Employment Development Department, having so stipulated, shall not offset against unemployment insurance any pension that is paid to a claimant on a lump-sum basis.

(18) Defendant Director of Employment Development Department, having so stipulated, shall restore to plaintiff class members any unemployment insurance benefits that would have been paid but for the offset of a pension that was paid to the claimant on a lump-sum basis.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

(19) Plaintiff's Second and Fourth Causes of Action, as set forth in the Amended Complaint, are dismissed without prejudice pursuant to F.R.Civ.P. 41(a)(1)(ii).

(20) The Court retains jurisdiction over plaintiff's prayer for an award of attorney's fees.

DATED: Oct. 6, 1982.

/s/ ROBERT F. PECKHAM

Chief United States
District Judge

Appendix G

United States Court of Appeals

For the Ninth Circuit

Nos. 81-4473, 82-4394, 82-4417, 82-4585, and 82-4607

Michael Rivera, etc.,
Plaintiff-Appellee, Cross-Appellant,

vs.

Gloria Becerra, Director, California Employment Development Department,
Defendant-Appellee,

and

Raymond J. Donovan, Secretary of Labor,
Defendant-Appellant, Cross-Appellee.

[Filed Mar. 28, 1983]

ORDER

Appeal from the United States District Court
for the Northern District of California

Before: Fairchild*, Hug, and Farris, Circuit Judges.

This case is remanded to the district court for a period of 45 days so that the district court may consider motions to vacate its judgment, permit intervention by Donald Volck and the United Auto Workers, and reinstate its judgment. This matter will be resubmitted to the same panel

*The Honorable Thomas E. Fairchild, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

45 days from the date of this order. The parties may each file a supplemental brief of not more than 15 pages, not later than 14 days after the date of resubmission to this panel, limited to the effect of the district court's actions on remand; the Secretary's current interpretation of 26 U.S.C. § 3304(a)(15)(B); and the relevance of that interpretation, if any, to section 3304(a)(15)(A)(i) and (ii).

Appendix H

United States District Court
Northern District of California

No. C-80-3469 RFP

Michael Rivera, et al.,
Plaintiffs-Cross-Appellant-Appellee,

vs.

Gloria Becerra, Director of California
Employment Development Department,
Defendant-Appellee,

and

Raymond J. Donovan, Secretary of
United States Department of Labor,
Defendant-Appellant-Cross-Appellee.

[Filed May 9, 1983]

STIPULATION AND ORDER FOR INTERVENTION AND REINSTATEMENT OF JUDGMENT

Pursuant to the order of remand entered in this action by the United States Court of Appeals for the Ninth Circuit on March 28, 1983,

IT IS HEREBY STIPULATED by and between the parties, through their respective counsel, that:

1. The judgment heretofore entered in this action on October 7, 1982 shall be vacated.

2. Proposed intervenors Donald Volck and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") shall be permitted to intervene in this case as parties plaintiff pursuant to Fed.R.Civ.Pro. 24, and their complaint in intervention submitted herewith shall be filed forthwith.

3. The judgment previously entered on October 7, 1982 shall be reinstated, with intervening plaintiffs Volck and UAW being treated as parties plaintiff with respect to said judgment.

Dated: May 6, 1983

Robert E. Taren
Attorney for Plaintiff Rivera

Jennifer Messersmith
Attorney for Donald E. Volck

Stephen P. Berzon
Michael Rubin
Altshuler & Berzon
Attorneys for Plaintiff Rivera,
Donald E. Volck and UAW

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Jordan Rossen
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By: /s/ MICHAEL RUBIN

Michael Rubin

Dated: May 6, 1983

John Van De Kamp
Attorney General of the
State of California
Asher Rubin
Deputy Attorney General
By: /s/ ASHER RUBIN

Attorneys for Gloria Becerra,
Director of the California
Employment Development
Department

STIPULATION AND ORDER

Dated: May 3, 1983

J. Paul McGrath
Assistant Attorney General
Joseph P. Russoniello
United States Attorney
Peter Waldmeir
Attorney, Federal Programs
Branch, Civil Division,
U.S. Department of Justice
By: /s/ PETER W.
WALDMEIR

Peter Waldmeir
Attorneys for Raymond J.
Donovan, Secretary of Labor

ORDER

It is so ordered.

Dated: May 9, 1983

Robert F. Peckham

United States District Judge

Appendix I

United States Court of Appeals
For the Ninth Circuit
Nos. 81-4473, 82-4394, 82-4417, 82-4585, 82-4607, 83-2006

DC No. C-80-3469 RFP

Michael Rivera, on behalf of himself and
all others similarly situated,
Plaintiff-Cross-Appellant-Appellee,

and

International Union, UAW,
Plaintiff-Intervenors-Cross-Appellants-Appellees,

vs.

Gloria Becerra, Director of
California Employment Development Department,
Defendant-Appellee,

and

Raymond J. Donovan, Secretary of the
United States Department of Labor,
Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court
for the Northern District of California

[Filed Sept. 28, 1983]

RULE 41(b) FED.R.APP.P.

Upon due consideration of Appellant's motion for stay of the mandate of this court in the above cause pending the filing, consideration and disposition by the Supreme Court

of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before October 27, 1983.

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted. In the event that the petition for writ of certiorari is granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Procter Hug, Jr.

United States Circuit Judge

Appendix J

United States Court of Appeals
for the Ninth Circuit

Nos. 81-4473, 82-4394, 82-4417, 82-4585, 82-4607, 83-2006,
DC No. C-80-3469 RFP

Michael Rivera, on behalf of himself and
all others similarly situated,
Plaintiff-Cross-Appellant-Appellee,

and

International Union, UAW; and Donald E. Volck;
Plaintiff-Intervenors-Cross-Appellants-Appellees,

v.

Gloria Becerra, Director of California Employment
Development Department,
Defendant-Appellee,

and

Raymond J. Donovan, Secretary of the United States
Department of Labor,
Defendant-Appellant-Cross-Appellee.

[Filed Nov. 3, 1983]

ORDER GRANTING MOTION FOR EXTENSION OF STAY OF MANDATE

Upon due consideration of the motion for an extension of the stay of the mandate of this court pending the filing,

consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, and good cause having shown,

IT IS ORDERED that the motion for an extension of the stay of mandate be, and hereby is, granted. Provided that the petition for a writ of certiorari is filed with the Supreme Court on or before November 10, 1983, this stay will continue pending final disposition of the case by the Supreme Court of the United States.

/s/ PROCTER HUG, JR.

United States Circuit Judge

Appendix K

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States and the following federal and state statutes:

a. 26 U.S.C. § 3304(a)(15), as amended by the Multiemployer Pension Plan Amendments Act of 1980, Pub.L. No. 96-364 § 414, 94 Stat. 1208 (1980), which provides:

> Requirements.—The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that—
>
> • • •
>
> (15) the amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week except that—
>
> (A) the requirements of this paragraph shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if—
>
> (i) such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period employer

or chargeable employer (as determined under applicable law), and

(ii) in the case of such a payment not made under the Social Security Act or the Railroad Retirement Act of 1974 (or the corresponding provisions of prior law), services performed for such employer by the individual after the beginning of the base period (or remuneration for such services) affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar payment, and

(B) the State law may provide for limitations on the amount of any such a reduction to take into account contributions made by the individual for the pension, retirement or retired pay, annuity, or other similar periodic payment. . . .

b. California Unemployment Insurance Code § 1255.3, which incorporates this federal statute by providing:

(a) Except as provided by subdivision (c), the amount of unemployment compensation benefits, extended duration benefits, and federal-state extended benefits payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced, but not below zero, by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week.

(b) The provisions of subdivision (a) shall be operative only during such time as Section 3304 of the Federal Unemployment Tax Act requires that state unemployment insurance laws contain such provisions as a condition of certification of state unemployment insurance laws by the Secretary of Labor.

(c) The provisions of subdivision (a) shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if both of the following are met:

(1) Such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period or chargeable employer.

(2) In the case of such a payment not made under the Social Security Act or the Railroad Retirement Act of 1974 (or the corresponding provisions of prior law), services performed for such employer by the individual after the beginning of the base period (or remuneration for such services) affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar periodic payment.

(d) The provisions of subdivision (a) shall not apply to that portion of any pension, retirement or retired pay, annuity or other similar periodic payment which is attributable to contributions made by the individual for the pension, retirement or retired pay, annuity, or other similar periodic payment.